Nos. 04-55732, 04-56167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARNES-WALLACE, *et al.*,

Plaintiffs-Appellants/Cross-Appellees

v.

BOY SCOUTS OF AMERICA, *et al.*,

Defendants-Appellees/Cross-Appellants

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES/CROSS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This case presents important questions of how the federal Establishment Clause applies to a local government's lease of public parkland to the Boy Scouts, an organization that requires its members to take an oath affirming, among numerous other duties, a duty to God. As a proprietor of public property to which individuals and organizations seek access, the United States has a general interest in how this issue is resolved. The United States has thus participated as *amicus curiae* in numerous cases involving Establishment Clause issues raised by groups seeking access to government-controlled property, including *Lamb's Chapel* v.

Center Moriches Union Free School District, 508 U.S. 384 (1993), and *Bronx Household of Faith* v. *Board of Education*, 331 F.3d 342 (2d Cir. 2003).

More particularly, the United States has an interest in how such issues are resolved with regard to the Boy Scouts, due to the special relationship between the United States and the Boy Scouts. In *Winkler* v. *Chicago School Reform Board of Trustees*, No. 99 Civ. 02424 (N.D. Ill.), the United States is defending certain statutory programs through which the Department of Defense and the Department of Housing and Urban Development, either directly or indirectly, provide assistance to the Boy Scouts. See 10 U.S.C. 2012; 10 U.S.C. 2554; 10 U.S.C. 2606; 32 U.S.C. 508; 42 U.S.C. 5301 *et seq.*; 42 U.S.C. 2900aa-4 *et seq.*

The United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a).[1]

STATEMENT OF THE ISSUES

Whether the City's two leases of public land to the Boy Scouts, under which the Boy Scouts agreed to build and maintain two parks and keep them open to the general public in exchange for limited control over the parks, violate the Establishment Clause.

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[1] The United States submitted an *amicus* brief to the district court below accompanied by a motion for leave to file. The district court denied the motion.

STATEMENT OF THE CASE

This appeal arises from a lawsuit filed in the summer of 2000 by two families against the City of San Diego and the Boy Scouts of America–Desert Pacific Council (Boy Scouts) concerning the City's long-term leases of two parcels of public parkland to the Boy Scouts. The district court granted summary judgment for plaintiffs on July 31, 2003 and April 12, 2004, finding that the leases violated the Establishment Clause of the United States Constitution and parallel provisions of the California Constitution. The Boy Scouts appealed. Plaintiffs moved to dismiss the appeal, and by order of this Court, plaintiffs were designated appellants/cross-appellees and Boy Scouts were designated appellees/cross-appellants.

The City of San Diego has leased property to more than 100 nonprofit organizations for little or no cash rent to provide for the "cultural, educational, and recreational enrichment of the citizens of the City." S.E.R. 10-14 ¶¶ 2, 6, 10-11, 19.[2] Many of those leases involve parkland from which the City benefits by saving development, maintenance, and operational costs, and in the provision of community services to the residents of San Diego. S.E.R. 11-14 ¶¶ 6, 7, 8, 16. A number of other leases involve property in residential and commercial zones.

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[2] E.R. ___ refers to the "Excerpts of Record" submitted by plaintiffs on January 3, 2005. S.E.R. ___ refers to the "Supplemental Excerpts of Record" submitted by Boy Scouts on February 14, 2005.

S.E.R. 13 ¶ 12. The lessees under the San Diego policy are diverse, ranging from the YMCA and the Jewish Community Center to the Vietnamese Federation of San Diego and the Black Police Officers Association. S.E.R. 11 ¶¶ 3, 6. A number of churches are among the lessees. S.E.R. 28-29.

The issue in this case involves two of these leases, between the City and the Boy Scouts for dedicated parkland in Balboa Park and Mission Bay Park (which includes Fiesta Island). The Boy Scouts of America is a nonprofit charitable organization that received a congressional charter in 1916 "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. 30902. All youth members and adult leaders must subscribe to the Scout Oath[3] and Law.[4] Together, these

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[3] 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.

E.R. 1460.

[4] The Scout Law states that a scout is "Trustworthy" "Obedient" "Loyal" "Cheerful" "Helpful" "Thrifty" "Friendly" "Brave" "Courteous" "Clean" "Kind"

(continued...)

entail acknowledging a duty to God, and recognizing reverence as a virtue. At the same time, however, the Scoutmaster Handbook stresses that the Boy Scouts is a nonsectarian organization, and that religious instruction remains the responsibility of a Scout's parent or guardian and his religious institution. E.R. 1527.

The original lease for Camp Balboa was entered into in 1957 for a period of 50 years. E.R. 607-608. This lease enabled the Boy Scouts to build a recreational facility and administrative offices for the Desert Pacific Council of the Boy Scouts. E.R. 1966 ¶ 9. The Boy Scouts also built nine campsites, made extensive improvements to the property, and maintains all of the facilities of Camp Balboa. S.E.R. 217-218 ¶¶ 17, 21. These facilities are available, for a nominal usage fee, to all community groups and individuals on a first-come, first-served reservation basis. S.E.R. 217 ¶ 18. In December 2001, prior to the lease's expiration date, the City renewed the lease for an additional 25 years, with an option to renew for an additional 15-year term. *Barnes-Wallace* v. *Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1264 (S.D. Cal. 2003). The terms of the renewal lease require the Boy Scouts to spend at least $1.7 million over the next seven years on improvements, remodeling, and new construction. E.R. 643.

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[4](...continued)
and "Reverent." E.R. 1460. Reverent is described as follows: "[h]e is faithful in his religious duties. He respects the beliefs of others." E.R. 1460.

In 1987, the City entered into a 25-year lease with the Boy Scouts for a half-acre parcel of public parkland located on Fiesta Island in Mission Bay Park. E.R. 671-673. The Fiesta Island Facility Committee, which was composed of more than 40 organizations serving youth in the San Diego area, had identified the Boy Scouts as the entity best able to provide the funding for construction and maintenance of a community aquatic park, and to run its operations. E.R. 3211 ¶ 8; E.R. 3289-3290 ¶ 6. In lieu of cash rent, the Boy Scouts committed to build the San Diego Youth Aquatic Center on Fiesta Island. The Aquatic Center is used by a wide variety of groups serving youth. The lease states that the Boy Scouts "can use/book no more than 75% of all available aquatic activities up to 7 days prior." 275 F. Supp. 2d at 1282. Both leases include nondiscrimination clauses prohibiting the Boy Scouts from discriminating in access to the properties against non-scouting individuals and organizations based, *inter alia*, on religion and sexual orientation. *Id.* at 1264-1265.

1. The District Court's July 31, 2003, Order: Balboa Park

In its first order, the district court evaluated the leases under the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Recognizing that the lease was secularly motivated and did not excessively entangle government and religion, the district court characterized the issue before it as "whether the City's lease of the public parkland to the [Boy Scouts] has the principal or primary effect of advancing

religion." 275 F. Supp. 2d at 1266. First, the court found the Boy Scouts to be a religious organization. Therefore, the court held that the City's action of negotiating a lease exclusively with the Boy Scouts constituted an unconstitutional endorsement of religion. *Id.* at 1276. The court explained that whether a reasonable observer would perceive the leases as an advancement of religion depends on whether the leases were made available on a neutral basis. *Id.* at 1269-1270. The district court held that the Balboa Park lease was not.[5] The court rejected the Boy Scouts' argument that the leases at issue were only two of more than one hundred leases granted to various organizations by the City to advance the educational, cultural, and recreational interests of the City. *Id.* at 1273-1274. The court held instead that the leases should be viewed in isolation because, notwithstanding the City's *practice* of entering into leases with various groups, there was no evidence that the City's leases to the Boy Scouts were part of any formal city-wide lease *program*. *Id.* at 1274.

2. The District Court's April 12, 2004, Order: Fiesta Island

In supplemental briefing before the district court, plaintiffs and the Boy Scouts presented similar arguments with respect to the Fiesta Island lease as they

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[5] Due to insufficient evidence, the district court did not rule on the constitutionality of the Fiesta Island lease in its initial decision.

did with respect to the Balboa Park lease. The court held that despite evidence that the Fiesta Island Youth Facility Committee – a large coalition of San Diego youth organizations – had put the Boy Scouts forward as the preferred lessee, "[t]he involvement of other entities does nothing to alter the fact that the City chose to deal only with the [Boy Scouts] as a potential lessee for the Fiesta Island property." E.R. 3741. The court ruled that, as with "the Balboa Park lease, '[t]he City handpicked as the preferred lessee an organization that describes religious belief and practice as fundamental to the services it provides.'" E.R. 3742 (quoting *Barnes-Wallace*, 275 F. Supp. 2d at 1276). As such, the court held that a reasonable observer would view the exclusive lease negotiations as the City's endorsement of the Boy Scouts' "inherently religious program and practices." E.R. 3743.

SUMMARY OF ARGUMENT

The district court erred in holding that the City's leases with the Boy Scouts violate the Establishment Clause. The district court seemed to rest its decisions entirely on the manner in which the City entered into its leases with the Boy Scouts and the "inherently religious" nature of the Boy Scouts – stressing that a reasonable observer would view the leases as an endorsement of the Boy Scouts "because of its inherently religious program and practices." *Barnes-Wallace* v. *Boy Scouts of*

Am., 275 F. Supp. 2d 1259, 1276 (S.D. Cal. 2003). The district court is wrong for several reasons.

First, the Boy Scouts is not an inherently religious organization with inherently religious programs and practices. Rather, the Boy Scouts is a social and recreational youth organization dedicated to promoting good character, citizenship, and personal fitness in boys.

Second, even if the Boy Scouts were considered a religious organization, there is no evidence to suggest that the City selected the Boy Scouts as the lessee *because of* its religious program and practices. The evidence shows instead that the City leased parkland to the Boy Scouts because of the Boy Scouts' proven ability to develop, construct, and maintain recreational facilities open to the general public, and because of the City's belief that it would receive a public benefit from a lease arrangement with the Boy Scouts. This case is thus not properly viewed as a case involving aid to a religious organization at all, but rather involving a value-for-value transaction.

Finally, even when analyzed under the Supreme Court's aid decisions, there is no Establishment Clause violation here. The leases involve a secular benefit, *i.e.*, use of land, which is distributed to a wide variety of recipients without reference to religion, and does not result in the diversion of aid to sectarian activities, thus

satisfying the standard set forth in *Mitchell* v. *Helms*, 530 U.S. 793 (2000); the leases were not made by the government with the purpose of advancing religion, nor do they have the principal or primary effect of advancing religion, satisfying the test of *Lemon*, as modified by *Agostini* v. *Felton*, 521 U.S. 203, 233-34 (1997); they would not, to the reasonable observer aware of the City's practice of leasing to a variety of nonprofits on similar terms, the general nature of the Boy Scouts, and the nature of the activities engaged in at Balboa Park and Fiesta Island, suggest government endorsement of religion, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); and they do not coerce anyone to engage in religious activity. *Id.* at 115.

ARGUMENT

I

THE BOY SCOUTS IS NOT A RELIGIOUS ORGANIZATION FOR PURPOSES OF ESTABLISHMENT CLAUSE ANALYSIS

The district court found as a threshold matter that the Boy Scouts is a religious organization for Establishment Clause purposes. See *Barnes-Wallace* v. *Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1270-1273 (S.D. Ca. 2003) (subsection B.1 of opinion, entitled "The Boy Scouts are a religious organization."). It is not. Contrary to the district court's decision, the Boy Scouts is not an "inherently religious" organization with inherently religious programs. Rather, the record

establishes that the Boy Scouts is a social and recreational organization dedicated to promoting good character, citizenship, and personal fitness in young boys in a manner that does not undermine, and in fact respects and supports, the religious values with which the boys enter the program.[6]

The Establishment Clause prevents the government from engaging in acts "that have the 'purpose' or 'effect' of advancing or inhibiting *religion*." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002) (emphasis added). A threshold question in this case, then, is whether the Boy Scouts, whose mission appellees assert is being advanced by the leases in question, is a religious institution for purposes of Establishment Clause analysis. See, *e.g.*, *Alvarado* v. *City of San Jose*, 94 F.3d 1223, 1226-1227 (9th Cir. 1996) (noting that before turning to the issue of whether a government-sponsored statue of the Aztec deity Quetzalcoatl violated the Establishment Clause, it must first consider whether the statue in question was "religious" for establishment purposes).

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[6] The district court believed that the Boy Scouts "conced[ed] that it is a religious organization." 275 F. Supp. 2d at 1273. While the Boy Scouts has stated that it is an organization with religious aspects, this is no admission that it is a religious organization for purposes of the Establishment Clause. See, *e.g.*, E.R. 2007 ¶¶ 184-188 (conceding that there are certain religious elements of scouting, but stating that they are immaterial to the present Establishment Clause claim).

The Court in *Alvarado* considered three factors in determining the meaning of "religion" under the Establishment Clause:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

94 F.3d at 1229. The "formal and external signs" include: "formal services, ceremonial functions, the existence of clergy, structure and organization, * * * observances of holidays and other similar manifestations associated with the traditional religions." *Ibid.*

In *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir.), cert. denied, 510 U.S. 963 (1993), this Court imposed a very high bar for determining when an entity with some religious aspects will be deemed "religious." In *Kamehameha Schools*, this Court held that a group of private schools that had daily class prayers, prayer before meals, required Christian religious instruction, and mandatory attendance at worship services were, nonetheless, not religious institutions under Title VII because the curriculum was predominantly secular. *Id.* at 463-464 ("We conclude the Schools are an essentially secular institution operating

within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not primarily religious.").[7]

Under this Court's precedents, the Boy Scouts, and the particular activities at issue, cannot be deemed to be "religious" for Establishment Clause purposes. Appellees primarily contend that the Boy Scouts is a religious institution because the Scout Law includes reverence and the Scout Oath includes a promise to do one's duty to God. E.R. 588 ¶ 5. But the Oath and the Law encompass a broad range of virtues. A scout also promises to do his duty to his country, to help other people, to stay physically fit and mentally alert, to be honest, and to obey the Scout Law. Of the twelve guiding principles set forth in the Scout Law, only one – reverence – is at all religious, and the definition of "reverence" makes clear that it refers not to any creed or belief but the value of each Scout being faithful to his religious duties, whatever they may be, and being tolerant of the beliefs of others. See note 4, *supra*. In context, it is clear that neither the Scout Oath nor the Scout

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[7] While some courts have applied more expansive definitions of religion in the free exercise context because such a construction "best serves free exercise values, the same expansiveness in interpreting the establishment clause is simply untenable in an age of such pervasive governmental activity." *Grove* v. *Mead Sch. Dist.*, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring) (noting that "a less expansive notion of religion [is] required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect" (quoting Laurence H. Tribe, *American Constitutional Law* 827-828 (The Foundation Press) (1978))), cert. denied, 474 U.S. 826 (1985).

Law are religious documents, but instead are blueprints for an organization that, in the words of its congressional charter, is dedicated "to promot[ing] * * * the ability of boys to do things for themselves and others, * * * and to teach[ing] them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. 30902. At its core, the Boy Scouts is a social and recreational organization dedicated to promoting good character, citizenship, and personal fitness in boys.

Consistent with the Scout Law and the Scout Oath, the record clearly establishes that the Boy Scouts' activities are not religious. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001) (noting that in determining whether an organization's activities are religious, "what matters is the substance of [its] activities"). Specifically, the Boy Scouts achieves its objective of developing character, citizenship, and personal fitness in boys by focusing on a vigorous program of outdoor activities and not through religious instruction or worship. Indeed, the Boy Scouts' governing documents make clear that it does not espouse any one religion or any particular religious belief. The Boy Scouts' Bylaws, Art. IX, § 1, for example, stress that religious instruction is better reserved for the "home and the organization or group with which the member is connected." E.R. 1580. Similarly, they declare that no member shall be required "to take part in or observe a religious ceremony distinctly unique" to a church or other religious

organizations. E.R. 1580. The Scoutmaster Handbook further provides that the Boy Scouts is a "nonsectarian organization" and reminds Scoutmasters that "religious instruction is the responsibility of a boy's parents or guardian and his religious institution." E.R. 1527. In short, the Boy Scouts does not address "fundamental and ultimate questions having to do with deep and imponderable matters," *Alvarado*, 94 F.3d at 1229, but instead provides a safe social and recreational outlet for boys that does not undermine, and in fact respects and supports, the religious values and character traits that parents choose to instill in their children.

Most courts that have squarely addressed the issue have specifically held that, notwithstanding the portions of the Scout Law and Scout Oath to which appellees object, the Boy Scouts is not a religious organization. See *Powell* v. *Bunn*, 59 P.3d 559, 579-580 (Or. Ct. App. 2002) (holding that the Boy Scouts' activities are primarily social and recreational); *Dale* v. *Boy Scouts of Am.*, 734 A.2d 1196, 1217 n.10 (N.J. 1999) ("That Boy Scouts' oath expresses a belief in God does not make it a religious institution."), rev'd on other grounds, 530 U.S. 640 (2000); cf. *Sherman* v. *Community Consol. Sch. Dist. of Wheeling Township*, 8 F.3d 1160 (7th Cir. 1993) (holding, without addressing threshold inquiry of whether the Boy Scouts is a religious organization, that elementary school did not violate the Establishment

Clause by allowing the Boy Scouts to use its facilities), cert. denied, 511 U.S. 1110 (1994).[8]

A holding that the Boy Scouts is a religious institution is inconsistent with (or at least renders superfluous) the Supreme Court's decision in *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), as it is well-settled that the Boy Scouts could have done everything it sought to do in that case had it simply been a religious institution for purposes of the Free Exercise Clause.[9] In the end, the membership

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[8] The Oregon Court of Appeals' decision on *Bunn* is particularly instructive:

> Plaintiff approaches the religious character of any group or organization as though it is an all-or-nothing proposition. * * * To be sure, there is a religious component to the Boy Scouts – that is, a scout must profess to believe in God and must take an oath to do his duty to God. In addition, a scout may choose to earn a religious emblem for his uniform by exploring his religious values. But a scout's religious beliefs – both their strength and their substance – are left to him and his family; any exploration of them is done individually and voluntarily. Beyond that, the record establishes that [the] bulk of the Boy Scouts' activities is secular.

59 P.3d at 579-580.

[9] *Dale* involved a claim by a man that New Jersey's anti-discrimination law prevented the Boy Scouts from denying him a leadership position on the ground that he was homosexual. 530 U.S. at 644. The Free Exercise Clause, however, insulates a religious organization's employment decisions regarding its leaders. See *Bollard* v. *California Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). And, if the Boy Scouts is not a religious organization for purposes of the Free Exercise Clause, then it simply cannot be a religious organization for purposes of the Establishment Clause, as the Free Exercise Clause's definition of a religious

(continued...)

requirements in question – that scouts believe in God and take an oath to do their duty to God – no more make the Boy Scouts a religious institution than a requirement that Congress open each legislative day with a prayer makes that body a religious one.[10] See *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (upholding as constitutional prayer before state legislative session conducted by state-paid chaplain); see also Kent Greenawalt, *Religion As a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 768 (1984) ("A simple requirement that members believe in God would not alone make an organization religious."). Because the benefits at issue in this case (*i.e.*, leases for recreational parklands) are purely secular, and because the Boy Scouts is not a religious institution, appellees' Establishment Clause claim fails at its inception.

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[9](...continued)
organization is much more expansive than the Establishment Clause's. See n.7, *supra*.

[10] Put another way, if a legislature opening a session with a prayer is constitutional, no one could plausibly contend that leases between the government and civic clubs or fraternal organizations that open their meetings with a prayer would violate the Establishment Clause.

II

EVEN IF THE BOY SCOUTS IS CONSIDERED RELIGIOUS, THE LEASES ARE VALUE-FOR-VALUE CONTRACTS, NOT "AID" TO A RELIGIOUS ORGANIZATION

The Supreme Court has upheld numerous contractual arrangements between the government and plainly religious organizations for the provision of aid, grants, and benefits. Indeed, the "Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988) (statute providing for abstinence and family education grants to organizations, including religious ones, did not violate the Establishment Clause).

This case, however, is much easier to analyze than the grant, aid, and benefit cases because it does not involve a grant, aid, or benefit being given by the City to the Boy Scouts. Rather, it involves a marketplace transaction in which each side received something of value. The Boy Scouts agreed to spend large sums of money to build and develop the Aquatic Center and Balboa park, assume all costs of operation and maintenance, and open the facilities for the benefit of the public, thus providing the City with a valuable benefit. In exchange, the Boy Scouts received long-term leases on property that was dedicated parkland with no commercial value. In light of the numerous cases in which the Supreme Court has upheld

government benefits being given through grants or aid to plainly religious organizations, discussed *infra*, it is difficult to imagine how an arms-length contract such as this could have the purpose or effect of advancing religion.

Value-for-value contracts between governments and religious organizations simply do not raise the same constitutional concerns as aid programs. For example, in *Christian Science Reading Room Jointly Maintained (CSRR)* v. *City & County of San Francisco*, 784 F.2d 1010, 1014-1015 (9th Cir. 1986), cert. denied, 479 U.S. 1066 (1987), this Court held that San Francisco's leasing of space in an airport to a religious organization for a religious information center did not violate the Establishment Clause. The Court found that the purpose of the lease was "purely secular: to obtain revenue," *id.* at 1014, and the principal effect of the lease was not to advance or endorse religion given the diversity of tenants at the airport. *Id.* at 1014-1015. Similarly, here the City entered into a contract with the purely secular objective and effect of exchanging use of publicly owned property for a tangible benefit to the public and the City.

The district court here attempted to distinguish *CSRR* by the fact that the two leases at issue in this case were negotiated exclusively with the Boy Scouts. Yet in *CSRR*, there was no evidence to suggest that any other entity competed for the specific lease held by the Reading Room. The Reading Room enjoyed a month-to-

month lease for the particular space it occupied. By renewing its lease each month rather than ending the month-to-month occupancy and requiring the Reading Room to compete with other interested organizations for the particular space it occupied, San Francisco continued a rental agreement with a religious organization at the exclusion of other interested parties. However, this Court based its decision on San Francisco's intent to obtain revenue and its general practice of leasing other available airport space to a wide variety of organizations. *CSRR*, 784 F.2d at 1015. San Francisco's actions in *CSRR* simply cannot be distinguished from the City's actions here.

III

EVEN ASSUMING THE BOY SCOUTS IS A RELIGIOUS ORGANIZATION AND THE LEASES ARE "AID," SUCH AID WOULD NOT VIOLATE THE CONSTITUTION

A. The Leases Are Constitutional Under The Supreme Court's Recent Aid Cases

Government aid to religious organizations is not *per se* unconstitutional. See, *e.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (upholding program providing instructional aids to be used for secular purposes to schools, including religious schools). As the Supreme Court stated in *Bowen*, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."

487 U.S. at 609. Indeed, the Court has warned that the government should be vigilant against discriminating against religious organizations. See, *e.g.,* *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("[I]n enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'") (quoting *Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947)).

In *Mitchell*, the Supreme Court upheld a program that loaned instructional aids such as computers to schools, including religious schools, to be used for secular instruction. A four-Justice plurality found that aid is constitutional if it 1) does not "result[] in religious indoctrination by the government"; and 2) does not "define[] its recipients by reference to religion." *Mitchell*, 530 U.S. at 808. In other words, secular aid distributed without reference to the religion of the recipient is constitutional. *See id.* at 820; *id.* at 837 (O'Connor, J., concurring).

Justices O'Connor and Breyer, who joined in the judgment and wrote separately, would add a third requirement: that the secular aid not be *actually diverted* to religious use. 530 U.S. at 857 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question is, or has been, used for

religious purposes."). However, Justices O'Connor and Breyer made clear that the actual diversion must be significant. *De minimis* diversions of government aid to religious purposes are insufficient to create an Establishment Clause violation. *Id.* at 861 (O'Connor, J., concurring).

Thus, to the extent that the leases could be considered "aid" rather than an arms-length, value-for-value contract with the Boy Scouts, this "aid" satisfies the standard of both the plurality and the concurrence in *Mitchell*. First, the parks at issue – as well as the activities engaged in on them by the Boy Scouts and numerous other youth organizations – are secular in nature. Put simply, camping is camping, kayaking is kayaking, and swimming is swimming, regardless of who engages in them. As the Supreme Court aptly explained in *Bowen*, the abstinence and family education projects at issue in that case were "facially neutral projects" that were not "'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." 487 U.S. at 613. If that is the case with abstinence and family education programs, then it is even more true with camping, kayaking, and swimming. The requirement of *Mitchell* that the aid be secular in nature is thus met here. See also *Agostini* v. *Felton*, 521 U.S. 203, 225 (1997) (upholding program in which public school teachers provided special educational services in parochial

schools, and stating "we have departed from the rule * * * that all government aid that directly assists the educational function of religious schools is invalid."); *Board of Educ.* v. *Allen*, 392 U.S. 236, 248 (1968) (upholding textbook loans to students in parochial schools and observing "parochial schools are performing, in addition to their sectarian function, the task of secular education").

Second, there is no evidence whatsoever that the City chose the Boy Scouts as the lessee "by reference to religion." *Mitchell*, 530 U.S. at 808. With regard to both leases, the evidence demonstrates that the Boy Scouts were chosen because of its ability to raise funds for and carry out major capital improvements to the parks, and maintain and operate them for the benefit of the public. Indeed, with regard to the Fiesta Island lease, the Boy Scouts were not really chosen by the City at all, but rather were put forward by a coalition of more than forty San Diego youth-serving organizations as the entity best able to provide the funding for and ongoing management of the aquatic center. Plaintiffs offered absolutely no evidence to suggest that any religious aspect of the Boy Scouts in any way affected the City's decision to grant the leases to the Boy Scouts. The facts make clear that the City's lease decisions were financially, not religiously, driven. Thus the requirement of *Mitchell* that recipients not be defined by reference to religion is met. See also *Bowen*, 487 U.S. at 605 (upholding statute including religious organizations as

recipients of grants for abstinence and family education programs, and noting that there was no "suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services"); *Rosenberger*, 515 U.S. at 840 (upholding inclusion of religious news magazine in student activities expense reimbursement program, in light of the diversity of the groups funded and the fact that "[t]here is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause").

The leases also satisfy the additional criterion set forth by the *Mitchell* concurrence. There is no evidence that the aquatic programs have been "actually diverted" to religious use by the Boy Scouts. It is hard to imagine how they could be. To the extent that some scouts might hypothetically do something that might be deemed by some to be religious while engaging in camping or water sports, such as reciting the Scout Law or wearing a religious emblem, such activities would certainly fall within the *de minimis* exception set forth by Justices O'Connor and Breyer in *Mitchell*.

The district court, instead of focusing on the nature of the aid at issue and the way in which it was provided, focused on the purported religious nature of the Boy Scouts. The district court recognized that the "pervasively sectarian" test was effectively overruled by *Mitchell*. *Barnes-Wallace* v. *Boy Scouts of Am.*, 275 F.

Supp. 2d 1259, 1269 (S.D. Cal. 2003); *see also Columbia Union Coll.* v. *Oliver*, 254 F.3d 496, 504 (4th Cir. 2001). The district court, however, merely applied the discarded test using a different name.

Under the pervasively sectarian doctrine, aid was presumed to advance religion when it was given to organizations, such as parochial schools, that were thought to be so infused with religion that even secular aid would effectively become the equivalent of religious aid in their hands. See *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973). The plurality in *Mitchell* observed that the concept had not been invoked since 1985, despite subsequent cases permitting aid to parochial schools; that the concept had failed to give due recognition to the fact that government aid could fulfill its secular purpose when given to any recipient; and that the "pervasively sectarian" concept "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 828. Justices O'Connor and Breyer similarly abandoned the pervasively sectarian concept and rejected an underlying principle of that doctrine: "that the secular educational function of a religious school is inseparable from its religious mission." *Id.* at 853. Instead, their separate opinion maintained that for there to be a constitutional violation there must be *actual* diversion to religious uses. They made clear that aid that "has the

capacity for, or presents the possibility of, such diversion" is insufficient to create a constitutional violation. *Id.* at 854.

Both the plurality and the separate opinion in *Mitchell* focused on the nature of the aid and whether it is distributed without reference to religion, with Justices O'Connor and Breyer adding the further requirement that the aid not be diverted to religious purposes. They both reject the idea that certain types of organizations are so religious that any aid given to them is necessarily constitutionally tainted. Yet, this is precisely what the district court did here. The district court focused on the Boy Scouts' alleged "inherently religious program and practices." 275 F. Supp. 2d at 1276. "Inherently religious," as used by the district court here, is just another name for "pervasively sectarian." The fact that the Scout Oath acknowledges a duty to God, that reverence is a virtue listed in the Scout Law, and that a few scouting activities have some religious aspects, does not convert secular activities like camping and canoeing into religious ones. This is precisely why the Court abandoned the pervasively sectarian doctrine: the nature of the aid and what is done with it, rather than whether the organization receiving it has a religious nature that pervades everything it touches, should be the focus of Establishment Clause inquiry. The district court erred in holding otherwise.

B. The Leases Are Constitutional Under The Supreme Court's Other Establishment Clause Tests

The Supreme Court has employed various other tests to evaluate alleged Establishment Clause violations. Under any of these formal tests (*i.e.*, the *Agostini* purpose/effects test, used here by the district court; endorsement; coercion), the City's leases with the Boy Scouts are constitutional.

1. Agostini *Purpose/Effect Test*

Government actions that have a secular purpose and that do not have the principal or primary effect of advancing religion do not violate the Establishment Clause. *Agostini*, 521 U.S. at 233-234.[11] The leases at issue here plainly have a secular purpose – to maximize the public benefit from undeveloped parkland. Thus, the only question is whether the leases have the principal or primary effect of advancing religion. They do not.

As noted above, the primary effect of the leases is secular: by leasing the parkland to the Boy Scouts, the City is able to provide recreational opportunities to all members of the public at minimal cost. The leases do not substantially advance the Boy Scouts' religious programs or practices; rather, they contractually obligate

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[11] *Agostini* modified the earlier three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), subsuming the entanglement prong within the "effects test." *Agostini*, 521 U.S. at 233-234.

the Boy Scouts to finance recreational facilities for the benefit of the City. Yet *even if* the Boy Scouts' religious elements are somehow advanced through its status as leaseholder, this would not be the *principal* or *primary* effect of the leases. Thus, the district court erred in focusing solely on the religious aspect of the Boy Scouts' organization when ruling that the leases improperly advanced religion. "Focus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). To the extent its status as leaseholder of land on which its headquarters, public campgrounds, and popular recreational facilities are located advances the Boy Scouts' mission *generally*, the leases advance the Boy Scouts' administrative and recreational objectives far more than they do any purported religious element of scouting. The advancement of religion is quite simply not the principal and primary effect of the leases.

2. Endorsement Test

The Supreme Court has also employed an "endorsement" test when evaluating alleged establishments of religion. Indeed, the district court incorporated part of this test when it held that a reasonable observer would view the City's exclusive negotiations with the Boy Scouts as an endorsement of the Boy Scouts "because of its inherently religious program and practices." *Barnes-Wallace*, 275

F. Supp. 2d at 1276. This application of the "reasonable observer" standard was flawed.

A "reasonable observer" is deemed to be aware of the history and context underlying a challenged program. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). Here, the reasonable observer would be aware that the City leased the parks to the Boy Scouts to provide recreational facilities for the benefit of the public. The reasonable observer would also be aware that, with respect to the Fiesta Island lease, more than 40 youth organizations proposed the Boy Scouts as the lessee best able to carry out the task effectively. The reasonable observer would also know that the City has leased public land to more than 100 organizations, including some that are religiously and ethnically defined. And knowing that the City leases public land to such a wide variety of organizations, the reasonable observer would not assume that the City was endorsing *any* of its lessees' practices. The reasonable observer would understand that the City's lease policy seeks to provide the maximum benefit to the public from public property. The various lessees – ranging from the YMCA and the Jewish Community Center to the Vietnamese Federation of San Diego and the Black Police Officers Association – simply reflect the City's diversity, not the City's endorsement of their particular views. See *Christian Sci. Reading Room Jointly Maintained* v. *City & County of*

San Francisco, 784 F.2d 1010, 1015 (9th Cir. 1986) (reasoning that by leasing commercial airport space to a religious organization, a city does not endorse the tenets of that religion, just as it does not endorse the "politics and policies of the foreign governments that own airlines, the consumption of alcohol and sourdough bread, and the reading of Penthouse magazine"), cert. denied, 479 U.S. 1066 (1987).

Even if the reasonable observer were to view the leases in isolation and ignore the leases with other community organizations, the observer nonetheless would be deemed aware of the overall program of the Boy Scouts and the relatively small part of that program that can be considered religious at all. More particularly, the observer would know that the parks were used predominantly for camping and aquatic activities. It is thus difficult to understand how the City's leases with the Boy Scouts could be viewed by a reasonable observer as an endorsement of the Boy Scouts' "inherently religious programs and practices." 275 F. Supp. 2d at 1276. If a reasonable observer viewed the leases as an endorsement of the Boy Scouts at all, it would be an endorsement of the Boy Scouts' proven ability to develop, construct, maintain, and insure parkland for the public's benefit.

3. Coercion

The Supreme Court has also applied, in certain cases, a "coercion test," examining "whether the community would feel coercive pressure to engage in the

[challenged] activities." *Good News Club*, 533 U.S. at 115. There is nothing in the record to suggest that, by holding a lease to public parkland and providing the public recreational opportunities, the Boy Scouts are somehow creating coercive pressure for the public to engage in religious exercises.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, counsel for the United States hereby certifies that there are no related cases pending in this Court.

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Date: February 15, 2005

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 6973 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2005, two copies of the BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES/CROSS-APPELLANTS AND URGING REVERSAL were served by first-class mail, postage pre-paid, on the following counsels of record:

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