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)

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

George A. Davidson
Carla A. Kerr
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: (212) 837-6000

Charles Avrith
HUGHES HUBBARD & REED LLP
350 South Grand Avenue, 36th Floor
Los Angeles, California 90071-3442
Telephone: (213) 613-2800

Scott H. Christensen
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 721-4600

Attorneys for Defendants-Appellees/Cross-Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

INTRODUCTION

In asking this Court to affirm the district court's decisions finding the Balboa Park and Fiesta Island leases unconstitutional, Plaintiffs have failed to provide the Court with a basis in constitutional text or precedent for doing so. Plaintiffs ask this Court to rely primarily on extreme interpretations of provisions of the California Constitution having no basis in the jurisprudence of the California Supreme Court. They ask this Court to apply case law concerning a 43-foot Latin cross, a 5,500-pound menorah, and a 125-ton depiction of the Last Supper to invalidate two leases for a youth campground and a youth aquatic center containing no religious symbols. They ask the Court to focus only on half-truths about the two leases to San Diego Boy Scouts instead of the history, context, and ubiquity of the City's leasing practices with respect to 123 comparable leases to nonprofits as required by controlling precedent. And then Plaintiffs ask the Court to moot the appeal of a lease to which they are not parties and have no standing to interpret.

Plaintiffs ask that the Court do all of this in spite of Plaintiffs' lack of standing to ask the Court to do anything. Plaintiffs suffered no injury, and the only evidence they could muster of a financial effect on the City shows that the leases to San Diego Boy Scouts benefit City taxpayers. The Boy Scouts are subsidizing the City, not the other way around.

I.
THE LEASES DO NOT VIOLATE FEDERAL OR STATE RELIGION CLAUSES

A. The Leases Do Not Violate the Establishment Clause

When faced with both federal and state religion clauses, this Court regularly analyzes the federal claims first. *See*, *e.g.*, *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232-33 (9th Cir. 1996) (dismissing federal Establishment Clause claims under *Lemon v. Kurtzman* and then dismissing claims under California's Establishment, No Preference, and No Aid Clauses); *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373, 1384-85 (9th Cir. 1994) (same); *Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010, 1015-16 (9th Cir. 1986) (same), *amended by* 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). The California Supreme Court itself begins with an analysis under the federal jurisprudence and only afterwards reaches the State constitutional claims. *See East Bay Asian Local Development Corp. v. State*, 24 Cal. 4th 693, 705-21, 13 P.3d 1122, 1130-40 (2000), *cert. denied*, 532 U.S. 1008 (2001); *Sands v. Morongo Unified School District*, 53 Cal. 3d 863, 870-84, 809 P.2d 809, 811-21 (1991).

Each one of the cases Plaintiffs cite deals with a sectarian group as the sole beneficiary of government action taken for a sectarian purpose (Pls. Resp. at 38-41), thus unequivocally failing both the purpose and effect prongs of the

analysis articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny. These cases have no bearing on the leases at issue here.

1. Boy Scouts Are Not "Religion"

Plaintiffs ignore Boy Scouts' observation that 43-foot Latin crosses and 5,500-pound menorahs on government property are not comparable to a youth campground and youth aquatic center which display no religious symbols and are open to all.

For example, Plaintiffs rely on *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (en banc), which concluded that constructing a 27-foot tall, 24-foot wide, 5,500 pound menorah 450 feet from City Hall violated the federal and State Establishment Clauses. (Pls. Resp. at 41.) Likewise, Plaintiffs cite *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994), which held that carving out a special public school district for the religious enclave of Satmar Hasidim, "practitioners of a strict form of Judaism," violated the federal Establishment Clause. (Pls. Resp. at 41-42.)

Plaintiffs also compare the leases of the campground and aquatic center here to *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992), which involved "a static collection of Christian symbols displayed and maintained by the government." 940 F.2d at 1568. The County of San Bernardino owned and maintained a public park that contained "36 immovable

statues and tableaus . . . which depict the story of the life of Christ as told in the New Testament." *Id*. at 1563. Each of the statues was "4 to 16 tons, except for the Last Supper Facade, which is estimated to weigh 125 tons." *Id.* The County dedicated the park "as Desert Christ Park, printed brochures which identified each of the statuary scenes by reference to Bible passages, and put an ad in the telephone directory advertising the park as a 'World Famous Theme Park . . . depicting the life of Christ.'" *Id.* The County maintained the park with money from the County's general fund. *Id.* The sculpture of The Last Supper "straddle[d] the property line of the church and the park." *Id.*

To say that the government establishes religion when it displays a three-ton menorah, carves out a special school district for Orthodox Jews, and owns and promotes a Christian park containing 36 huge Christian statues is a far cry from saying that the government does the same when it leases property without religious symbols to a youth camping organization for the purpose of operating a campground and aquatic center.

In the absence of any giant crucifix, menorah, or statue of Jesus, Plaintiffs assert that "BSA signs and insignia on structures throughout the premises"—which Plaintiffs have never visited—are "reminders" of the religious purposes of the leases. (Pls. Resp. at 35.) The only such sign or insignia that remains is the Scout shield,

which is substantially similar to the official seal of the district court below,

(SER 746; ER 3717 ¶ 57.) Neither is a religious symbol.

Furthermore, the most cursory review of the *Boy Scout Handbook* shows that the Scouting program's primary emphasis is on outdoor activity, not religious devotion. (SER 736-979.) The undisputed evidence before the district court is that a young Scout's principal activities are camping, boating, kayaking, archery, swimming, and a wide variety of other outdoor activity. (*See*, *e.g.*, SER 215-18.)

With respect to Scouting's values, Scouts and adult leaders in Boy Scouting promise to do their duty to the country, "help other people at all times," keep "physically strong, mentally awake, and morally straight," and be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty,

brave, [and] clean," as well as to do their duty to God and to be reverent. (SER 745.) Boy Scouts encourage youth members to practice all of these values in their everyday lives. (SER 961 ¶ 13, 962 ¶ 9, 963 ¶ 10, 964 ¶ 2, 965 ¶ 2, 966 ¶ 2.) Boy Scouts recognize the importance of religious faith and duty, but they explicitly leave faith-based instruction to the member's religious leaders and family.[1] (ER 1580.)

2. The Leases to Boy Scouts Are Not Endorsement of Religion

Even if Boy Scouts were religion, the City's inclusion of them in the nonprofit leasing program including 123 leases would not constitute endorsement or advancement of Boy Scouts. The precedent does not support Plaintiffs' insistence on viewing the two leases to San Diego Boy Scouts in isolation. Neither does the precedent support Plaintiffs' insistence that exclusive negotiations with San Diego Boy Scouts—a common enough procedure that the City engaged in

---

1. While there is no dispute that Boy Scouts encourage boys to practice their religions, that is not an Establishment Clause violation—it is protected speech. *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (noting the "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"; emphasis in original). Girl Scouts, Camp Fire, and Boy Scouts all make religious emblems materials of different faiths available to their members, and a small percentage chooses to earn them. In 2001, 3.1% of Cub Scouts earned a religious emblem of their faith, 1.6% of Boy Scouts, and 0.8% of Venturers. (SER 510 ¶ 5.)

with at least eight other nonprofit lessees—negate government neutrality toward religion.

The cases of *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), *Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), and *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994), demonstrate that the entire leasing program is at issue, not just the two parcels leased to San Diego Boy Scouts. In *Christian Science* and *Hawley*, the courts looked at all the groups and businesses that occupied the airport, and in *Kreisner*, the court looked at the uses of Balboa Park as a whole.

Just as the space in the municipal airport in *Christian Science* was "generally available to all who wish to hawk their wares" (Pls. Resp. at 44; Calif. Br. at 20 n.10), the City makes leases available to a breathtakingly broad variety of nonprofits for little or no cash rent. These include groups ranging from two Presbyterian churches to community centers for Vietnamese or Mexican-Americans, to charities concerned with children or the elderly, to an art museum:

- Barrio Station
- San Diego Calvary Korean Church
- Girl Scouts
- Boys & Girls Clubs
- Camp Fire
- Sherman Heights Community Center
- Jewish Community Center
- La Jolla Youth
- Little League
- Point Loma Community Presbyterian Church
- Vietnamese Federation of San Diego
- Pro Kids Golf Academy
- Black Police Officers Association
- YMCA
- Elderhelp of San Diego
- San Diego Homeless Coalition
- San Diegans United for Safe Neighborhoods
- San Diego Youth and Community Services
- Alzheimer's Family Center
- Logan Heights Family Health Center
- San Diego County Jobs for Progress
- Ocean Beach Child Care Project
- San Diego Historical Society Museum
- San Diego Art Institute
- San Diego Natural History Museum
- Reuben H. Fleet Science Center
- San Diego Aerospace Museum
- Old Globe Theater
- San Diego Zoo
- Japanese Friendship Garden

(SER 14, 27-29.)

Included in these 123 leases are the two to San Diego Boy Scouts, or 1.6% of the nonprofit leases entered into by the City. *See American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351, 358 (D.C. Cir. 2005) (no violation of Establishment Clause when 328 of 1,608 schools

employing AmeriCorps participants as teachers are religious schools) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 655-58 (2002), where 82% of eligible schools receiving vouchers were religious and 96% of students using vouchers attended religious schools). Furthermore, 59 leases are for parkland, not city hall or even a municipal airport. (SER 207 ¶ 4; SER 14 ¶ 16) (Pls. Resp. at 44, 46.) In any event, the Fiesta Island lease is for 0.01% of Mission Bay Park, and the Balboa Park lease is for 1% of Balboa Park. There is no way from these leases to find endorsement or advancement of Boy Scouts.[2]

Two recent Establishment Clause decisions reinforce the importance of the context of government action as evidence of government neutrality. In *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005), the Seventh Circuit considered a display in a county administration building of the Ten Commandments among nine other historical documents—including the Bill of

---

2. The ACLU, Plaintiffs' counsel, successfully argued to the U.S. Supreme Court that the Ku Klux Klan has a constitutional right to display a Christian cross among other holiday displays, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), and to participate in a state adopt-a-highway program among other organizations, *Cuffley v. Mickes,* 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001). Similarly, the State of California recently argued that the history, context, and ubiquity of the Pledge of Allegiance led to the conclusion that it poses no Establishment Clause threat. (*See Amicus Curiae* Brief of States, *Elk Grove Unified School District v. Newdow*, 2003 WL 23011472 at *7-*10 (U.S., filed Dec. 18, 2003).)

Rights, the Magna Carta, the Declaration of Independence, and the Mayflower Compact—that were flanked by the flags of Indiana and the United States. *Id*. at 858-59.[3] The Seventh Circuit noted that the effect of a challenged action "is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended." *Id*. at 867.[4] The court faulted the district court for "circumscrib[ing] its focus and consider[ing] the Ten Commandments in isolation from the other documents." *Id*. at 864. Indeed, the "Supreme Court has cautioned against so narrow an analysis: '[To] focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.'" *Id*. (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). Instead, the "content and context" of the display, considered as a whole, "suggest that the Ten Commandments are included not for their singular religious

---

3. The U.S. Supreme Court currently is considering two similar cases: *Van Orden v. Perry*, No. 03-1500 and *McCreary County v. ACLU of Kentucky*, No. 03-1693. Decisions are expected by June 2005.

4. Plaintiffs ask the Court to adopt what has been called a "heckler's veto," a "ignoramus's veto," or an "obtuse observer" standard. See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, ___, 124 S. Ct. 2301, 2321 (2004) (O'Connor, J., concurring), *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc), and *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring), respectively.

import." *Id*. at 868. A reasonable observer of the display "will think history, not religion." *Id*. at 869.

Here, that the City's leasing program does not exclude religious messages among 123 nonprofit leases is a sign of neutrality toward religion, not endorsement.

In addition, that government actions benefiting religion are discretionary does not imply that they are not neutral. In *American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005), the AmeriCorps Education Award Program (the "EAP") provided participants with $4,725 in educational financial aid in return for community service in programs sponsored by approved organizations. *Id.* at 354. In addition, the EAP provided the sponsoring organizations with $400 grants for every full-time participant in their programs. *Id*. at 355. The court was untroubled by the fact that AmeriCorps uses "highly discretionary criteria" to choose the sponsoring organizations, including sectarian organizations. *Id*. at 357. "Why, as a matter of constitutional law, this ought to be significant is not clear. The Supreme Court has not treated discretionary distribution of government funds as lacking in neutrality." *Id*. (citing *Bowen v. Kendrick*, 487 U.S. 589 (1988)). The court stated:

> We are aware of nothing in the law requiring that government aid, to pass muster under the Establishment Clause, must be handed out according to objective criteria only. All the law requires is that the government

> distributes funds in a manner that is neutral with respect to religion.

Id. (emphasis added). Because there was no evidence that the EAP favored "religious organizations," the court concluded "that the program is neutral." *Id*.

Here, the district court's reliance on the City's discretionary decision to engage in "exclusive negotiations" with San Diego Boy Scouts is unsound constitutionally. The lease to San Diego Boy Scouts was negotiated in the same way as the lease to the Girl Scouts; indeed, the leases were approved at the same hearing. (SER 24-26, 193-95, 431-36.) The record shows that the City negotiated exclusively for leases with at least eight other sectarian and secular organizations (*see* Boy Scout Br. at 14), and there is no evidence that the City used its discretion "to favor religious organizations" over others.

3. Assertions That Boy Scouts Are Bad Gatekeepers Are Wrong and Without Constitutional Import

Plaintiffs' endorsement argument consists of assertions that Boy Scouts are bad gatekeepers for public usage. First, these assertions are wrong. There is no evidence Boy Scouts have violated the leases. Under the leases, San Diego Boy Scouts may not discriminate in who may use the properties, and the record shows that San Diego Boy Scouts does not do so. (*Compare* SER 12 ¶ 9; 281-82 (153:3-156:15); 315-16 (229:2-231:6) *with* Pls. Resp. at 34-35.) There is no evidence of any discrimination whatsoever. (ER 2696.) Second, had Plaintiffs

proved that Boy Scouts were bad gatekeepers, the remedy would have been enforcement of the lease provisions, not an injunction of an Establishment Clause violation. *See American Jewish Congress*, 399 F.3d at 358 (the remedy for breaking the rules in a neutral program is corrective action; it is "not of constitutional concern").

The evidence is that residents 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*.) Plaintiffs present no evidence of anything imposed on any member of the public who uses the property.[5]

Plaintiffs' claim that the leases "primarily benefit the Scouts themselves" (Pls. Resp. at 46) is not supported by the statistics that Plaintiffs obtained in discovery. The fact that the public uses the Youth Aquatic Center more than the Scouts do shows that the lease provides a public service to the community. (SER 216.) Despite the fact that Scouting is a camping organization and obviously is a heavy user of Camp Balboa, more than a third of the usage is by

---

5. There is no "requirement that one affirm a belief in God in order to participate in recreational and social activities on public parklands." (Calif. Br. at 11.) Camping in Camp Balboa as a member of the public has nothing to do with joining the Boy Scouts and participating in Scouting activities. (*Id*. at 4.)

members of the public. (SER 218.) Thousands of San Diegans unaffiliated with Boy Scouts have enjoyed these properties. (*See*, *e.g.*, ER 2266-96.)

Furthermore, despite Plaintiffs' assertions, the evidence shows that neither Camp Balboa nor the Aquatic Center is ever closed to non-Scout users. The swimming pool at Camp Balboa is used by the YMCA, the Boys and Girls Clubs, and Camp Reach for the Sky even during Cub Scout day camp. (SER 291 (171:9-25, 172:1-51); 225 ¶ 3; ER 2256.) Any non-Scout group can reserve a campsite during the day camp period, and San Diego Boy Scouts has not turned away any non-Scout group during that time. (SER 291 (170:13-15, 171:3-6).) Even if all nine campsites have been reserved, San Diego Boy Scouts makes two overflow campsites available. (SER 622 (140:12-15); 291 (170:5-12); 624-25 (157:21-158:10) ("There's always someplace in Camp Balboa to . . . fit somebody in. It's the talent of our ranger. We try and make sure we're going to accommodate folks.").) On several occasions, non-Scout youth groups have both camped in the campsites and used the large meeting hall while the Cub Scout day camp was in operation. (SER 624 (156:16-157:16).)

Of course, on some occasions, the combination of Scout and non-Scout users may fill the facilities, but that would occur no matter who operated the property. Thus, the Youth Aquatic Center is unavailable for additional use by the general public during certain weeks of the summer because Sea Camp, a non-Scout

group, uses almost all of the rest of the facilities during the weeks of San Diego Boy Scouts' summer camp. (SER 693 (44:14-45:13); 728 (65:9-20).)[6]

Plaintiffs also complain that the public's nominal usage fees are deposited in San Diego Boy Scouts' general fund. (Pls. Br. at 35.) Similarly, the plaintiffs and the district court in *American Jewish Congress* had objected to government cash awards of $400 going into the general funds of sectarian organizations without being segregated and without confirmation that the funds were not used for sectarian purposes. *See American Jewish Congress v. Corporation for National and Community Services,* 323 F. Supp. 2d 44, 46 (D.D.C. 2004). The court of appeals, however, was not troubled by the fact that the $400 grants went directly to the general funds of sectarian organizations. *See* 399 F.3d at 354. The court found that the $400 grants were far less than the administrative costs incurred and held that the "government does not promote religion in violation of the Establishment Clause when it reimburses all grantees, religious and secular alike, for a portion of the costs they incur in complying with the requirements of

---

6. Plaintiffs' unsupported claims that "homosexuals indisputably cannot use the properties during the numerous Scout-only functions" (Pls. Resp. at 59) is false. Plaintiffs themselves have never tried to use the properties, and all the evidence is that they would be welcomed if they chose to do so. (ER 8; SER 242 (91:25-92:3); 235 (104:24-105:8); 252 (35:4-10); 244 (45:18-20); 245 (48:2-5).) Gay and lesbian parents inquired about usage and were expressly encouraged to use both properties. (SER 315-16 (229:2-231:6); 281-82 (153:3-154:12).)

the AmeriCorps program." *Id*. at 359. Here, the record is clear that San Diego Boy Scouts incur costs substantially exceeding the user fees. (*See*, *e.g.*, ER 1140 (178:1-16).)

Finally, Plaintiffs cite a throw-away comment in a deposition that there are other groups that would like to lease in Balboa Park. (Pls. Resp. at 45.) Like the dog that did not bark in the night, the most significant circumstance here is what did not happen—in all the debate at public meetings to consider the renewal of the Balboa lease, and after all the publicity that has surrounded this suit, no other group has come forward to express a willingness to assume either lease. The reasons are obvious: the commitment to maintain the properties and make the required capital improvements makes the leases a serious financial burden on the lessee. The only groups prepared to dig deep into their own pockets to operate a community youth camping facility are those whose own members are actively participating in youth camping. (SER 204.) The San Diego affiliates of the other two national youth camping organizations already have their own leases of Balboa Park property. (SER 56-63, 155-92.) Other groups enjoy full access to the properties now without the burdens of maintaining them.

B. The Leases Do Not Violate California's Establishment and No Preference Clauses

According to the California Supreme Court, California's Establishment and No Preference Clauses, Cal. Const., art. I, § 4, have never been

"definitively construed," and neither clause "creates broader protections than those of the First Amendment." *East Bay Asian Local Development Corp. v. State*, 24 Cal. 4th 693, 718-19, 13 P.3d 1122, 1139 (2000). According to this Court, an action based on California's Establishment and No Preference Clauses is analyzed "by reference to *Lemon v. Kurtzman*" under the First Amendment to the U.S. Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th Cir. 2002) (en banc) (citing *East Bay Asian*), *cert. denied*, 538 U.S. 978 (2003). Thus, the City here did not violate the Establishment Clause if it acted with a secular purpose and the action does not have the primary effect of advancing religion. (Boy Scouts Br. at 28, *et seq*.)

Here, the district court and Plaintiffs agreed that the City acted with a secular purpose.[7] The only question is whether the primary effect of having two out of 123 leases with the Boy Scouts is to advance religion. Because the leases do

---

7. That Scouts are the "best suited to fulfill the City's needs with respect to the parkland" is not "Scouts' conclusory statement" (Pls. Resp. at 26), but the conclusion of the court below, *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1287 (S.D. Cal. 2003), and Plaintiffs' long-standing admission: "[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." (Pls.' Mem. at 2 (DE 152).) The City "offers a secular rationale" for the leases, 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).)

not result in "governmental indoctrination" of religion, excessively entangle the City with religion, or define lease recipients "by reference to religion," *Agostini v. Felton*, 521 U.S. 203, 234 (1997); *see Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000), there is no advancement of religion.

Plaintiffs urge this Court to follow Justice Mosk's concurring opinion in *Sands v. Morongo Unified School District*, 53 Cal. 3d 863, 809 P.2d 809 (1991), in which the California Supreme Court held that benedictions by Protestant and Catholic clergy at public high school graduations violated the federal Establishment Clause. (Pls. Resp. at 29.) Justice Mosk concluded that government acts unconstitutionally when it bestows "differential benefit on religion." *Sands*, 53 Cal. 3d at 911-12, 809 P.2d at 840. However, Plaintiffs ignore Justice Mosk's "exception to this general rule":

> A benefit conferred on religion will not be considered an unconstitutional preference if it occurs in a forum accessible to a multitude of viewpoints and forms of expression, both religious and secular. Thus, the public library, the museum-like city hall rotunda, the multicultural billboard . . . are limited-purpose public forums; the denial of religious expression in these forums would raise the specter of discrimination against religion. Under such circumstances, the granting of access to religious expression in a public forum does not constitute an unconstitutional preference.

53 Cal. 3d at 912 n.4, 809 P.2d at 840 n.4(emphasis added and citations omitted).

Here, the City leases to nonprofits without regard to their viewpoint or expression, as it is required to do. (SER 11 ¶ 6.)

C. The Leases Do Not Violate California's No Aid Clause

The No Aid Clause of the California Constitution prohibits "any religious sect, church, creed, or sectarian purpose" from receiving "aid," including "any grant or donation of . . . real estate." Cal. Const., art. XVI, § 5. Plaintiffs ask this Court to stretch both the plain language of the No Aid Clause and the precedent applying it in order to cover value-for-value leases of parkland held open for public use. (Pls. Resp. at 13.)

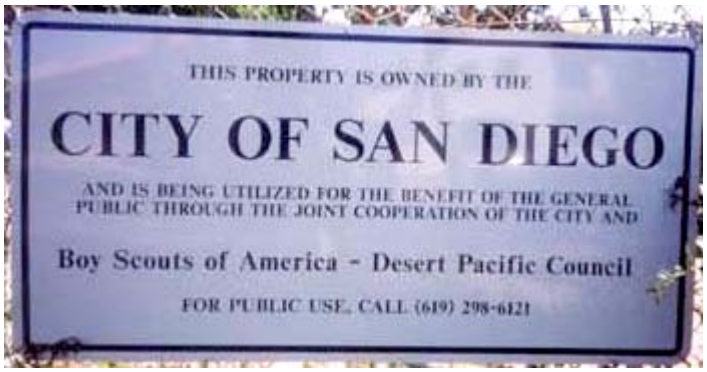
The No Aid Clause simply does not apply here. (Pls. Resp. at 14, 25-26.) First, Boy Scouts are not religious sects or churches, and they have no creeds or sectarian purposes.[8] Boy Scouts are "absolutely nonsectarian." (ER 1580 art. IX, § 1, cl.1; *see* SER 273 (227:1-6); 274 (230:20-23:11); 75 (75:7-8).) Plaintiffs present no evidence that the leases "promot[e] a sectarian purpose." (Pls. Resp. at 26.)

---

8. California notes that the term "creed" is neither defined in the California Constitution nor construed by California courts, but suggests that it be defined as the beliefs held by a "congregation, a synod, or a church." (Calif. Br. at 8 & n.3 (internal citations omitted).) Boy Scouts are not a congregation, a synod, or a church.

Second, the leases at issue are not "aid" to Boy Scouts or "a grant or donation . . . of real estate." (Pls. Resp. at 16.) The flow of money here is from San Diego Boy Scouts to the City. Even Plaintiffs say that it would be less expensive for San Diego Boy Scouts to purchase the property for its exclusive use than what it has invested for public use. (Boy Scouts Br. at 23-24.)

The sign required by the City at the gates of Camp Balboa shows that there is no grant of real estate:



(SER 22.) The property is "owned by the City" and "is being utilized for the benefit of the general public." (*Id.*)

Furthermore, this Court has held that the No Aid Clause prohibits the government from granting a benefit to any sectarian purpose, "unless the benefit is properly characterized as indirect, remote, or incidental." *Paulson v. City of San Diego*, 294 F.3d 1124, 1131 (9th Cir. 2002) (emphasis added); *see California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605, 526 P.2d 513, 521 (1974).

A benefit which results from a primarily "public purpose" qualifies as "indirect, remote, or incidental" if it is "available 'on an equal basis' to sectarian and nonsectarian organizations and if it 'does not have a substantial effect of supporting religious activities.'" *Paulson*, 294 F.3d at 1131 (quoting *Priest*, 12 Cal. 3d at 606, 526 P.2d at 521). The California Supreme Court in *Priest* upheld a program that gave sectarian colleges loans at below-market rates for capital improvements, as long as the particular buildings being financed were not used for sectarian purposes. *Priest*, 12 Cal. 3d at 604, 526 P.2d at 520.

Here, any benefit that Boy Scouts receive is incidental because the primary purpose of the leases is a public purpose and leases are available on an equal basis to all nonprofits, which currently receive 123 leases, including 59 for leases of parkland property. (SER 207 ¶ 4; SER 14 ¶ 16.) And some lessees have sectarian objectives while others have secular objectives. *Paulson*, 294 F.3d at 1131. The Jewish Community Center, for example, conducts sectarian preschool and summer camp, including weekly Sabbath services, on its leased parkland property. (SER 445, 449, 450, 459.)

Plaintiffs' reliance on *Paulson*, only undermines their No Aid Clause claim. (Pls. Resp. at 14.) *Paulson* was the culmination of a "protracted saga" of a 43-foot tall Latin cross that was constructed on City property with the permission of the City Council and was maintained with public funds. 294 F.3d at 1125. A

lawsuit and permanent injunction prohibited the City from keeping the cross on City land. *Id.* at 1126. The City then decided to sell the land under the cross in order to "SAVE THE CROSS." *Id.* Because the "City's primary purpose for the sale was to preserve the cross," the district court invalidated the sale. *Id.* The City then invited bids for a larger parcel of land including the cross, but required that the purchaser use the property for a war memorial and allowed the retention of the cross to satisfy this condition. *Id.* at 1127-28. This Court found that the sale violated the No Aid Clause because it was created to provide a "financial incentive" to preserve "a symbol that conveys a specifically Christian message." *Id.* at 1132. Indeed, the City had the "subjective goal" of preserving the 43-foot cross. *Id.* at 1132 n.5.

Here, unlike in *Paulson*, the two parcels of property at issue do not contain giant crosses or any other religious symbols. Neither is there a use of City funds or a City purpose of promoting religion in evidence.

Similarly, in *Woodland Hills Homeowners Association v. Los Angeles Community College District*, 218 Cal. App. 3d 79, 266 Cal. Rptr. 767 (1990), the court rejected a No Aid Clause challenge to a 75-year lease of city property to "Shir Chadesh–The New Reform Congregation" for the purpose of building a temple and religious village. *Id.* Although the city put the property up for bidding, the only bid received was from the Congregation. *Id.* at 86. The plaintiffs argued

that the bidding was preceded by "private negotiations" between the city and the Congregation and that the lease price was for less than market value. *Id.* at 87. The court rejected both federal and State constitutional claims, stating that "[a]ny benefits to the Congregation, other than the ordinary consequences resulting from the lease of real property, which happen to benefit the lessee in a religious or philosophical manner, are incidental." *Id.* at 94; *see Christian Science*, 784 F.2d at 1016.

II.
TO EXCLUDE BOY SCOUTS FROM THE CITY'S LEASING PROGRAM BECAUSE THEY BELIEVE IN GOD WOULD VIOLATE THE FIRST AMENDMENT

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, 828-29 (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). Application of the federal or State religion clauses "must be limited by the Free Exercise Clause and the Free Speech Clause." *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993).

The fact that the City here has a policy and practice of making its property available for leasing to outside organizations is enough to create a public forum for First Amendment purposes. *See* Council Policy No. 700-04 (SER 36-38); Council Policy No. 700-08 (SER 30-35); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups."). (*See* Pls. Resp. at 29-30.)

The United States Supreme Court has prohibited viewpoint discrimination in government forums in a series of cases directly on point. In *Rosenberger*, the Supreme Court found that a public university engaged in unconstitutional viewpoint discrimination when it denied funding to *Wide Awake: A Christian Perspective at the University of Virginia*, an otherwise eligible student publication, based on the publication's viewpoint. 515 U.S. at 837.

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 829 (emphasis added and citation omitted); *see Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-94 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001). The instant case is, of

course, much easier than *Rosenberger* because there is no City funding of Boy Scouts. (SER 3 ¶ 9, 5 ¶ 17.)

This Court has applied *Rosenberger* to reject viewpoint discrimination in the administration of municipal leases. In *Metro Display Advertising, Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998), the City of Victorville attempted to exclude an advertiser from City bus shelters by threatening to cancel the City's advertising lease. Relying on *Rosenberger*, the Court held that "[t]he government cannot regulate a private individual's speech in order to promote or restrain promotion of that individual's viewpoint." *Id.* at 1195. "Even in a nonpublic forum, . . . 'the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.'" 143 F.3d at 1196 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 806 (1985)).[9]

9. *See Hills v. Scottsdale Unified School District*, 329 F.3d 1044, 1050-53 (9th Cir. 2003); *Brown v. California Department of Transportation*, 321 F.3d 1217, 1222-25 (9th Cir. 2003); *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002) *cert. denied*, 540 U.S. 813 (2003); *Sammartano v. First Judicial District Court*, 303 F.3d 959, 965-72 (9th Cir. 2002); *Tucker v. State of California Department of Education*, 97 F.3d 1204, 1214-16 (9th Cir. 1996).

III.
PLAINTIFFS HAVE NO STANDING

Plaintiffs do not have standing as taxpayers and do not have standing on the basis of their "feelings" and "beliefs" about Boy Scouts.

A. There Is No Basis for Municipal Taxpayer Standing

Plaintiffs insist that "rent-free" or "subsidized" leases are a harm to the municipal fisc (Pls. Resp. at 51-52), but ignore that these leases are anything but free: San Diego Boy Scouts invested $2.5 million to build the Youth Aquatic Center—$1.5 million of which was required by the lease—and must invest $1.7 million in Camp Balboa. The only subsidy here is from Boy Scouts to the City.

Plaintiffs claim to "object to the use of their tax money going" to Boy Scouts (Pls. Resp. at 50 n.13), but it is undisputed fact that the City spends nothing on the leases to San Diego Boy Scouts (SER 3 ¶ 9, 5 ¶ 17). Plaintiffs have no evidence of "specific amounts" of City spending that was "occasioned solely by" the leases to San Diego Boy Scouts. *Doe v. Madison School District No. 321*, 177 F.3d 789, 793-94 (9th Cir. 1999) (en banc); *see Doremus v. Board of Education*, 342 U.S. 429, 434 (1952); *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001). As a result, Plaintiffs cannot satisfy their burden of showing municipal

taxpayer standing.[10]

The undisputed evidence shows that Boy Scouts pay more to improve the properties and hold them open for use by the public than Plaintiffs claim the properties are worth to buy outright for exclusive use. (*See* Boy Scouts Br. at 23-24.) Dedicated public parkland that by law may not be used for anything other than recreation, open space, or cemetery uses has no "open 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).) (Pls. Resp. at 17.)

B. "Feelings" and "Beliefs" About Boy Scouts Are No Basis for Standing

Plaintiffs' "feelings" and "beliefs" about Boy Scouts (ER 84-85, 369-71) do not render them "injured" or "aggrieved" for any other sort of standing.

---

10. The $50,000 which was used to improve the Camp Balboa property (Pls. Resp. at 52) was federal money provided by the U.S. Department of Housing and Urban Development, which did not affect the municipal fisc. (SER 1292-93.) Plaintiffs do not allege federal taxpayer standing. (Pls. Mem. at 20 n.6 (DE 26).) The district court in *Winkler v. Chicago School Reform Board of Trustees*, No. 99-C-2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), cited by Plaintiffs, held that HUD grants to Scouting did not violate the Establishment Clause. To the extent the court held otherwise with respect to another federal program, it did so by relying on the district court decision on appeal here. The latter aspects of the *Winkler* decision are unlikely to withstand Seventh Circuit review. *See Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005); *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 8 F.3d 1160 (7th Cir. 1993).

Plaintiffs fail to show any "actual or threatened injury" as a result of the City leasing to San Diego Boy Scouts, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), and have failed to meet their burden of proving standing, *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). Under Plaintiffs' view of standing, young boys could sue Girl Scouts—which limits membership to girls—to revoke its lease because they are uncomfortable with girls.

In *Books* and every other case cited by Plaintiffs, the injury was the avoidance of "a government display of a religious object." 401 F.3d at 861. Here, of course, there is no religious display—by the government or Boy Scouts—whatsoever. Plaintiffs attempt to gloss over this fact by citing *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), for the assertion that standing can be established even where there are "minimal outward signs" of religion. (Pls. Resp. at 54 n.17.) They neglect to mention that the chapel at issue in *Hawley* contained "permanent furnishings which, if not exclusively Catholic, bespeak at least a Christian orientation and are common to Catholic places of worship (e.g., an altar, a holy water font, a statue of the Madonna)." 773 F.2d at 737. Again, Plaintiffs are comparing a campground and aquatic facility without any religious objects to a sectarian place of worship.

Virtually all government contracts are for the benefit of the public, but as the California Supreme Court ruled in *Martinez v. Socoma Companies, Inc.*, 11 Cal. 3d 394, 400-06, 521 P.2d 841, 844-50 (1974), that does not grant the public standing to sue for breach of contract. *See* Cal. Civ. Code § 1559; Restatement (Second) of Contracts § 313 cmt. a (1981).

IV.
PLAINTIFFS' MOOTNESS CLAIM IS FRIVOLOUS

A contract is interpreted to give effect to the mutual intention of the parties to that contract. (Pls. Resp. at 6.) Both parties, the City and San Diego Boy Scouts, agree that the Camp Balboa lease provision means that when the district court's decision is reversed, the lease will continue in effect for its term. (SER 1290-91.) In fact, a letter sent by the City recently in response to an auditor's request shows that the City does not expect the lease to expire until 2027. (Trout Decl. Ex. A.) Boy Scouts' appeal of the Balboa Park lease is not moot.

Had the lease in fact ended by its terms upon entry of the judgment below and thereby mooted an appeal, there would have been no reason for Plaintiffs to require in their settlement with the City that the City not participate in an appeal of that judgment. (SER 1113, ¶ 4.)

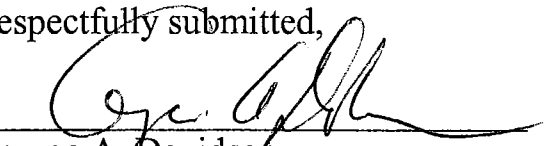
In any event, because the Court can reverse the erroneous decision below and grant effective relief, the appeal is not moot. (Pls. Resp. at 10 n.5.)

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: April 21, 2005

Respectfully submitted,



George A. Davidson
Carla A. Kerr
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: (212) 837-6000

Charles Avrith
HUGHES HUBBARD & REED LLP
350 South Grand Avenue, 36th Floor
Los Angeles, California 90071-3442
Telephone: (213) 613-2800

Scott H. Christensen
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 721-4600

Attorneys for Defendants-Appellees/Cross-Appellants Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America

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 6,899 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 21, 2005

Scott H. Christensen
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 721-4600

Attorneys for Defendants-Appellees/ Cross-Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2005, I served copies of the Reply 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:

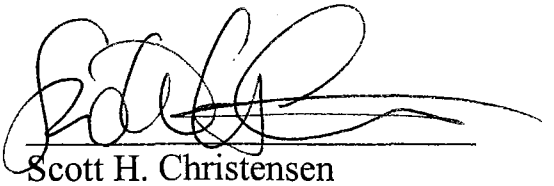
Mark W. Danis, Esq.
M. Andrew Woodmansee, Esq.
Katherine L. Parker, Esq.
Morrison & Foerster LLP
3811 Valley Centre Drive, Suite 500
San Diego, CA 92130-2332

Jordan C. Budd, Esq.
Elvira Cacciavillani, Esq.
Watson G. Branch, Esq.
ACLU Foundation of San Diego
& Imperial Counties
110 West C Street, Suite 901
San Diego, CA 92101

M. E. Stephens, Esq.
Stock Stephens LLP
1551 Fourth Avenue, Suite 503
San Diego, CA 92101

William S. Donnell, Esq.
Deputy City Attorney
Office of the City Attorney of San Diego
Civil Division
1200 Third Ave., Suite 1100
San Diego, CA 92101-4100

Dated: April 21, 2005



Scott H. Christensen