Nos. 04-55732 and 04-56167

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LORI & LYNN BARNES-WALLACE; MITCHELL BARNES WALLACE; MICHAEL & VALERIE BREEN; and MAXWELL BREEN,

Plaintiffs-Appellants/Cross-Appellees,

v.

BOY SCOUTS OF AMERICA and DESERT PACIFIC COUNCIL, BOY SCOUTS OF AMERICA

Defendants-Appellees/Cross-Appellants.

On Appeal From the United States District Court
For the Southern District of California, No. 00-CV-1726-J-(AJB)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF BOY SCOUTS OF AMERICA AND DESERT PACIFIC COUNCIL, BOY SCOUTS OF AMERICA AND REVERSAL OF THE DISTRICT COURT

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ARGUMENT

I. THE BOY SCOUTS OF AMERICA, AND ITS SUBDIVISIONS, ARE NOT DISCRIMINATORY ORGANIZATIONS.

Plaintiffs repeat over and over that the Boy Scouts are a discriminatory and exclusionary organization. Plaintiffs' Opening Brief (hereafter "Pl. Op. Br.") at 12, 13, 14, 23-25, 26-28, 29. The alleged basis for this is that Scout membership requirements include a belief in God, among many other requirements. The Scouts also will not accept as members or adult leaders those who openly engage in conduct that contradicts Scout moral teachings, including homosexual conduct.

But this does not mean that the Scouts are a discriminatory or exclusionary organization. They are an organization composed of subdivisions of neighborhood parents and adults who come together with neighborhood children to teach them traditional moral values, as well as engage in recreational activities for boys. With this mission, naturally they only include members and leaders who will accept those values. To label this discriminatory and exclusionary, and a civil rights violation, is an assault on the very freedom of American citizens to advance, promote, and teach traditional moral values.

On the reasoning of Plaintiffs, every Christian organization in America would be discriminatory and exclusionary because they exclude

atheists, agnostics, and other non-Christians from membership. The same would be true of every Muslim organization, every Jewish organization, and every nonsectarian religious organization. Is this Court really going to tell the nation that every such organization is a discriminatory civil rights violator whose contacts with Federal, state and local governments, and participation in public life, must be strictly limited as a result? That would be a misjudgment and a misapplication of law that would cause great social strife in our nation.

Citizens are free to come together and form organizations to advance particular religious viewpoints, naturally excluding those who do not share those viewpoints. That is constitutionally protected Free Exercise of Religion, not a discriminatory civil rights violation. Similarly, citizens can come together and form organizations to advance, promote, and teach traditional moral values, again naturally excluding those who will not share these views. This again is not a discriminatory civil rights violation, but the constitutionally protected exercise of Free Speech.

Indeed, the Supreme Court has already expressly held that exactly what the Plaintiffs call discrimination is a constitutionally protected right of the Boy Scouts. In ***Boy Scouts of America v. Dale,*** **530 U.S. 640 (2000),** the Court held that the Scouts were constitutionally protected by the right of

freedom of expressive association in refusing to retain an openly gay adult Scout leader. The Scouts were free to choose what messages and doctrines they would espouse, including traditional moral values opposing homosexual conduct. If the Scouts were forced to retain adult leaders who openly flouted and opposed their messages and doctrines, the Scouts would lose control over their own freedom of expression, and effectively be forced to communicate messages and doctrines contrary to their desired expressions.

This means in turn that the Scouts could not be denied the leases at issue in this case on the grounds of such supposed discrimination. For under the doctrine of unconstitutional conditions a local government may not penalize a private entity for the exercise of a constitutional right. ***Perry v. Sinderman,* 408 U.S. 593 (1972), *Speiser v. Randall,* 357 U.S. 513 (1958), *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990), *Bd. of Comm'rs, Waubensee County v. Umbehr,* 518 U.S. 668 (1996); *Legal Services Corp. v. Velasquez,* 531 U.S. 533 (2001); *FCC v. League of Women Voters,* 468 U.S. 364 (1984); *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development,* 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991); *Kinney v. Weaver,* __F.3d__, No. 00-40557, 2002 WL 1764145 (5th Cir. July 31,2002); *Cuffley v. Mickes,* 208 F.3d 702 (8th Cir.**

2000), *cert. denied,* 532 U.S. 903 (2001); *Anderson v. McCotter,* 100 F.3d 723 (10th Cir. 1996); *Hyland v. Wonder,* 972 F.2d 1129 (9th Cir. 1992), *cert. denied,* 508 U.S. 908 (1993). This is fundamental to the recognition of a constitutional right. For how can one be said to have a constitutional right and be penalized or punished by the government for exercising it?

Consequently, the Boy Scouts are not a discriminatory or exclusionary organization. The City of San Diego was right in not refusing the leases to the Scouts on the grounds of such supposed discrimination, and in not finding the Scouts in violation of the lease prohibitions against discrimination. These actions of the City, therefore, did not evidence preferential treatment for the Scouts indicating an Establishment Clause violation, contrary to the allegations of Plaintiffs.

II. THIS CASE DOES NOT INVOLVE AID TO RELIGION.

The City of San Diego is not providing aid to the Boy Scouts under the leases at issue in this case. Quite to the contrary, under those leases, the Boy Scouts are providing charitable aid to the City and the people of San Diego.

It is true that the City has agreed under the leases to accept only modest fees from the Scouts for lease of the properties. But that is because

the intent of the leases is for the Scouts to spend millions of dollars on capital improvements on the properties to build first class facilities for youth camping, water sports, and outdoor recreation. The Scouts are also to spend well over a hundred thousand dollars each year to administer and maintain the facilities on these properties. During the long term of these leases, the Scouts have done exactly that.

At Camp Balboa, the Scouts have constructed nine campsites, a swimming pool, an amphitheater, a program lodge, a picnic area, a parking lot, restrooms, showers, storage facilities, a ham radio room, a climbing wall, administrative headquarters, and a residence and office for a camp ranger. The Scouts have also financed improvements to bring water and power to the property, and have paid for landscaping and planting trees. (SER 217). From 1996 to 2000 alone, the Scouts spent $748,056 on capital improvements, maintenance, and operating costs at Camp Balboa. (ER 732). Under the renewed lease, the Scouts are to spend a minimum of an additional $1.7 million on Camp Balboa improvements. (ER 820). The Scouts are also to continue providing the full costs of administration and maintenance for the facility. (ER 814-23).

Under the Fiesta Island lease, the Scouts have by now spent about $2.5 million on building and endowing the Youth Aquatic Center, with all of

its capital improvements. (SER 215, 1084). They also bear the costs for the entire lease term of all taxes levied on the property, all utilities and associated service and installation charges, insurance for property damage, fire, extended coverage, and vandalism, and a City-specified best management practices program involving parking lots, landscaping, erosion control, storm drains, recyclables, and hazardous materials. (ER 672, 673, 679, 681-83, 689) They also bear the full costs of operation and maintenance for the facilities, which currently amount to about $148,000 per year for both Camp Balboa and the Youth Aquatic Center, and will amount to millions of dollars over the life of the two leases. (SER 215, 1084).

Indeed, the Boy Scouts have spent more on the Balboa Park and Fiesta Island facilities than the Plaintiffs' own experts say the leased properties would be worth if sold on the open market limited to park and recreational uses. Their experts said the Camp Balboa land would be worth $1.25 to $1.9 million if sold for recreational use. (ER 30, para. 42; ER 1975 para. 42). But with the documented $750,000 spent just from 1996 to 2000, and the additional $1.7 million in capital improvements to the property called for in the current lease, the Scouts have already committed far more to the property right there alone, not to mention the continuing administrative

and maintenance costs, and the capital and maintenance costs from 1957 to 1995.

Similarly, Plaintiffs' experts estimated the leased Youth Aquatic Center property to be worth $1.25 million if sold for recreation purposes.[2] (ER 31, para. 48; ER 1976, para. 48). But as discussed above, the Scouts have already spent $2.5 million in capital improvements for the facility, besides the major and ongoing administrative and maintenance expenses.

As a result, the people of San Deigo now enjoy a first class youth camping and outdoor recreation facility at Balboa Park and a first class youth aquatic center on Fiesta Island in Mission Bay, all at no cost to the taxpayers. Indeed, the Balboa Park lease now even requires the Boy Scouts to pay a $2,500 annual administrative fee which more than covers any negligible expense involved in City employees administering the lease. (SER 24-25).

These facilities are open to the public on a first-come, first served basis, and are consequently extensively utilized by the public and non-Scout youth groups. Campsites at Camp Balboa, available for a negligible fee of

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[2] These market values are certainly wildly overstated if the buyers are going to provide the same services to the public as the Scouts have. For who is going to spend millions for properties that carry with them the right to spend millions more to serve the public? But, in any event, the Scouts have already spent far more than even these inflated estimates.

$4 per camper, have been used by Junior Athletes in Wheelchair Sports, Boys and Girls Clubs, YMCA, Red Cross, Girl Scouts, Camp Fire Girls and Boys, a day camp for children with cancer, a hospice for children, and school, church, and civic groups. (SER 197, 198, 218, 220-25, 280, 286, 297, 304). The Youth Aquatic Center has been used by the Girl Scouts, Camp Fire Girls and Boys, Red Cross, Junior Life Guards, YMCA, Indian Guides and Indian Princesses, San Diego Camping Club, Rotary Club, Blazing Paddles, American Canoers Association, City of San Diego Lifeguards, Royal Rangers, Drug Education for Youth, a group for at-risk, inner city youth, and numerous school and church youth groups. (SER 216). Indeed, non-Scout groups use the Aquatic Center about twice as much as Scout groups. (SER 216). No group has ever been denied use of the facilities for any reason other than a preexisting reservation, and Scouting groups pay the same nominal fees for usage as everyone else. (SER 216, para. 11).

The Scouts are happy to provide this public service because they are, after all, a public charity and the organization is dedicated to contributing to the general community as one of its central values. This is the kind of thing the Scouts do all over the country.

Of course, the Scouts gain a benefit as well because the facilities are now available for use by the Scouts also. But because the Scouts, not the City, paid for the facilities themselves, indeed far more than the leased properties would be worth on the market, their own use of it would not amount to aid to religion.

Consequently, because the leases do not involve aid from the City to the Scouts, but, quite the opposite, aid from the Scouts to the City and the general public, this case cannot possibly involve an unconstitutional establishment of religion. Indisputably, the purpose of the City in entering into the lease was purely secular, to gain the offered financing for first class youth recreation facilities. Just as clearly, the primary effect of the arrangement was not to advance religion, but to advance youth camping and water sports. Not one dollar ever went to the Scouts from the City, and the City incurs no costs under the leases. Rather, millions have gone from the Scouts to advance youth camping and water recreation activities for the benefit of the general public as well as the Scouts, far more than the properties could ever be worth on the open market. There is no religious component to the public's use of the facilities. Any religious component in the Scouts' use is financed with their own funds, and is entirely internal to the Scouting organization itself, involving private, religious expression. As

a result, any such Scout religious activities are, in fact, constitutionally protected.

Because this case does not involve aid from the City to the Scouts, but rather aid from the Scouts to the City, there is also no violation of the California Constitution. Accepting proposed aid from a religious organization does not violate the state constitution's No Preference Clause, because the City is not displaying any preference for the Scouts in accepting the proposed arrangement to provide such aid. The City would accept such aid from any source, religious or non-religious. Indeed, the City has demonstrated that in accepting similar arrangements from over 100 other non-profits, including many religious ones. (SER 11, 13-15, 27-29, 87-88).

Moreover, where, as here, the aid runs from the religious institution to the public rather than the other way, the California Constitution's No Aid Clause is quite clearly not implicated. The benefit the Scouts gain under this arrangement at best is no different than the net gain from use of any leased property by any other lessee, and the lease of public property by religious institutions at market rents has already been declared constitutional. ***Woodland Hills Homeowners Organization v. Los Angeles Community College District,* 266 Cal, Rptr. 767 (Cal. Ct. App. 1990); *Christian Science Reading Room v. City and County of San Francisco,* 784 F. 2d**

1010 (9th Cir. 1986); *Hawley v. City of Cleveland,* 24 F.3d 814 (6th Cir. 1994)(at least 17 public airports around the country lease space to private religious organizations to provide chapels). Again, here the City gained financial aid from the Scouts much greater than any market rent it could have obtained.

The District Court alleged that through the lease the City provided the Scouts with the benefits of "valuable parkland for a nominal fee despite the City's written policy against leasing that very property to discriminatory organizations" and "the accommodation that the City will not apply the leases' nondiscrimination clause to the organization's membership." 275 F.Supp.2d at 1278. But the lease was not provided to the Scouts for a nominal fee. It was provided to the Scouts in return for millions of dollars spent on capital improvements, administration and maintenance for valuable facilities open to the public on a first come, first served basis, adding up to much more than any market rent that could have been obtained. Moreover, as discussed above, the Scouts are not a discriminatory organization. Rather, again, what the Court here calls discrimination the Supreme Court has recognized as constitutionally protected freedom of expression by the Scouts, ***Dale***, and, indeed, the Scouts cannot be penalized for exercise of that right. ***Perry; Speiser; Rutan; Legal Services Corp.; League of Women***

Voters; Planned Parenthood Federation of America; Kinney; Cuffley; Anderson; Hyland.

Other benefits the Court mentions are the authority to exclusively occupy portions of the leased parkland for the Scout regional headquarters, the print shop, and the Scout shop which generates substantial sale revenue, as well as the authority to charge the public entrance fees to the facilities. ." 275 F.Supp.2d at 1278. But since the Scouts paid for use of the parkland with millions of dollars in expenditures on the facilities open to the public, again much more than could have been obtained from any market rent, exclusive use of a small part of the facilities does not constitute unconstitutional aid to religion. On the same grounds, the Scouts may constitutionally charge nominal user fees that offset only a small portion of the huge subsidy the Scouts have provided to the City and the public through its expenditures under the leases. Those nominal fees do not change the fundamental fact that the leases involved a huge subsidy from the Scouts to the City and the public, rather than visa versa, so there was no unconstitutional aid to religion provided through the leases.

III. PLAINTIFFS HAVE NOT SUFFERED ANY HARM OR INJURY

The record clearly establishes that the Plaintiffs have not suffered any harm or injury as a result of the leases to the Boy Scouts at issue in this case. None of the Plaintiffs have ever been denied access to the Camp Balboa or Fiesta Island facilities. Indeed, they admit that they have never even tried to use the facilities. If they had tried to use them, the record leaves no doubt that under the long established policies of the Scouts they would not have been excluded. Rather, they would have been allowed to use the facilities on the same terms as everyone else. Even the District Court below found that "Plaintiffs point to no evidence that the [San Diego Boy Scouts] has discriminated against any individual in violation of [the leases]." 275 F. Supp. 2d at 1282 (ER2696).

We are concerned that Plaintiffs would represent to this Court that "Only individuals permitted to join the BSA or DPC may enjoy full and equal access to the leased parkland", Pl. Op. Br. at 40, as that statement is so wildly unrelated to the record in this case. The record establishes that Camp Balboa and the Youth Aquatic Center are open to the public and the Scouts alike on a first-come, first-served reservation basis. (SER 216-17, 295, 307, 317, 617). No group has ever been denied use of the facilities for any reason other than a pre-existing reservation. (SER 216). As discussed above,

numerous outside groups use the facilities, and the Youth Aquatic Center is even used now more by non-Scout groups than Scout groups.

Plaintiffs go on and on about how religious the Scout program is, to the point of misrepresenting the true, mostly secular nature of that program. Pl. Op. Br. at 7-13, 19-21, 22-23. But all of that discussion is irrelevant to this case precisely because individuals do not have to join the Scouts to use the facilities on the same terms as everyone else.

Plaintiffs even seem to object to use of the facilities by the Scouts at all. They complain that "Balboa Park is in fact closed for "Scout-only" functions for substantial periods of time." Pl. Op. Br. at 40. Of course, if the Scouts make reservations for use of the facilities they are entitled to use those facilities just like anyone else. But often there is room for others to use the facilities at the same time that the Scouts do. (SER 218). If the City, or another non-profit, ran the facility, the Scouts would be constitutionally protected in making reservations to use the facility on the same terms as everyone else, which would again include periods when the facility was exclusively used by the Scouts.

Plaintiffs reveal that the real basis for their complaint against the Boy Scouts is that they bitterly object to the values, messages and doctrines promoted and taught by the Scouts. For example, they state, "We object to

the Boy Scouts conducting religious activities and religious indoctrination of young boys on this public parkland..." Pl. Op. Br. at 49. One Plaintiff family states that it "avoids the Fiesta Island facility, as well as the Balboa Park site, because of the ongoing religious activities that occur on the premises, and because the facilities themselves pervasively reflect the Scouts' dominant presence, which serves as a constant reminder of the religious and discriminatory purposes to which the parkland has been devoted." Id.

If Plaintiffs want to avoid even the sight of the Scouts because they so bitterly detest their message and beliefs, that is Plaintiffs' right. But that avoidance is not an injury giving Plaintiffs the right to shut down the Scouts free expression of such views, and banish them from public parkland. Rather, as discussed above, the Scouts' free expression of their values and doctrines is constitutionally protected, and they cannot be penalized for exercising that constitutional right.

Consider the case of an anti-Christian bigot who says he cannot use a public airport because part of the facility is rented to a large Christian bookstore, and he can't bear the sight of it. Or consider an anti-homosexual bigot who says his son can't attend school fairs because of the presence of the school's Gay and Lesbian Alliance. On the reasoning of the Plaintiffs in

this case, this avoidance in both cases motivated by bigotry provides the basis for excluding the targets of the bigotry from the public facility.

IV. THE PLAINTIFFS DO NOT HAVE STANDING TO BRING THIS ACTION.

The Plaintiffs do not remotely have standing to bring the claims alleged in this action, and the case should be fully disposed of on this ground alone. The well-established standard for standing requires the Plaintiff to show:

(1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"

(2) that the injury "fairly can be traced to the challenged action," and

(3) that the injury "is likely to be redressed by a favorable decision."

***Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982)**(citations omitted).

Plaintiffs have not shown and cannot show any injury or harm entitling them to such standing, as discussed above. Plaintiffs also cannot claim standing as taxpayers. As discussed above, this is not a case of government aid to the Boy Scouts. Rather, the Scouts are providing aid to the City, and the public, through the leases, by spending millions on capital improvements, and hundreds of thousands each year on administration and

maintenance of the facilities. The leases are a vehicle for the Scouts to provide this enormous amount of charitable resources to the City and the public. Through these expenditures, the public enjoys first class camping and youth aquatic facilities at no cost to the taxpayers.

Indeed, for Plaintiffs to qualify for municipal taxpayer standing, they would have to show that the City would have spent fewer tax dollars if it had not leased the property to the City. ***Doremus v. Board of Education,* 342 U.S. 429 (1952); *Cantrell v. City of Long Beach,* 241 F.3d 674, 683 (9th Cir. 2001)**(no taxpayer standing because plaintiff failed to "allege a direct injury caused by the expenditure of tax dollars"); ***Doe v. Madison School District No. 321,* 177 F.3d 789 (9thj Cir. 1999); *Cammack v. Waihee,* 932 F.2d 765 (9th Cir.1999); *ACLU-NJ V. Township of Wall,* 246 F.3d 258, 263-64 (3d. Cir. 2001)**(no taxpayer standing because plaintiffs "failed to establish that the Township has spent any money, much less money obtained through property taxes" on religious elements of a holiday display.)

In ***Doe,*** this Court said, "'taxpayer standing,' by its nature, requires an injury resulting from a government's expenditure of tax revenues," 177 F.3d at 793. This Court also said that taxpayer standing requires the plaintiff to allege "specific amounts of money that the government has spent solely on the unlawful activity." Id. at 794.

But in this case, the evidence shows that the City did not spend any taxpayer dollars at all on the leased properties. In fact, without the lease the taxpayers would have had to bear considerable sums to maintain and administer just the leased parkland itself, let alone any similar facilities. The City spends about $1.5 million per year to maintain the rest of the parkland in Balboa Park, and close to $15,000 per year to maintain each of the 115 public buildings in the park. (SER 72).

Moreover, the evidence shows that if the Boy Scout leases were cancelled the City would just lease the facilities to another non-profit on the same terms. (SER 8). Incredibly, the Plaintiffs have stated in the record that they would be fully satisfied with this, even under the same rent and lease terms. (SER 241(75:7-24); 234 (55:17-21); 252 (36:14-20); 247 (98:5-106:22). This shows that the Plaintiffs are not bringing any sort of taxpayer claim. They are bringing the claims because they object to the internal policies of the Boy Scouts, which they do not have standing to challenge.

In addition, this evidence shows as well that the third prong of the standing standard above would not be satisfied. For canceling the Boy Scout leases would just result in a lease with the same financial terms with another non-profit, if not considerable additional cost to the taxpayers if no other

non-profit was found that could handle those financial terms, as is quite likely.

Valley Forge is, in fact, directly on point. In that case, the Federal government granted at no charge 77 acres of land appraised at $577,500 to the highly sectarian Valley Forge Christian College. The College planned to use the property for training "men and women for Christian service as either ministers or laymen" 454 U.S. at 468-469. The Court found no taxpayer standing because "the ultimate purchaser would, in all likelihood, have been another non-profit institution ...rather than a purchaser for cash." Id. at 480, n.17.

Standing requirements are no mere technicality. They are meant to prevent parties from bringing to the courts purely philosophical arguments unrelated to any specific injury that can be redressed, and which should be dealt with in the political sphere of debate. That is exactly the case here, as Plaintiffs have suffered no injury or harm whatsoever, and merely object to the internal, constitutionally protected, policies of a private organization in which they do not hold or have even sought membership.

V. THE DECISION OF THE COURT BELOW WAS BASED ON VIEWPOINT DISCRIMINATION AGAINST THE BOY SCOUTS.

The record shows that the City has entered into similar leases of public land with 123 other nonprofit organizations. (SER 13-15). These include religious organizations like the San Diego Calvary Korean Church, the Point Loma Community Presbyterian Church, the Jewish Community Center, and the Salvation Army. (SER 11, 27-29). It also includes organizations with memberships based on ethnicity, such as the Vietnamese Federation of San Diego and the Black Police Officers Association. Id.

The only difference between the leases to the Boy Scouts and the leases to these other organizations is the message and doctrines of the Scouts, to which the Court below openly objected. The Court characterized the Scout requirement that members believe in God as an "anti-agnostic and anti-atheist stance." 275 F. Supp. 2d at 1263 (ER 2669). The Court also consistently referred to the Scouts as "discriminatory." 275 F. Supp. 2d at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288 (ER 2670, 2671, 2684, 2690, 2693, 2694, 2695, 2696, 2700, 2702, 2703).

This viewpoint discrimination is a violation of the constitutionally protected freedom of religion and freedom of expression of the Boy Scouts and cannot be allowed to stand.

CONCLUSION

For the reasons stated above, *amicus curiae* American Civil Rights Union respectfully submits that the decision of the Court below should be reversed, and the case dismissed.

Dated: February 24, 2005.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-56517

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of *Amicus Curiae* American Civil Rights Union in Support of the Boy Scouts of America and Reversal of the District Court, is proportionally spaced, has a typeface of 14 points or more, and contains 4,891 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 23, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 24, 2005, I mailed first class, postage prepaid copies of the foregoing Brief of *Amicus Curiae* American Civil Rights Union to the following:

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