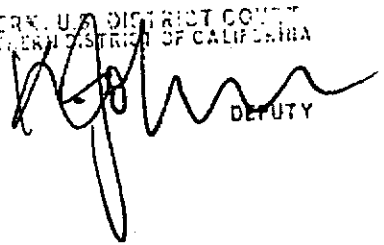


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LORI & LYNN BARNES-WALLACE,
ET AL.,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, ET AL.,

Defendants.

Civil No.00CV1726-J (AJB)

**ORDER GRANTING IN PART AND
DENYING IN PART CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

[Doc. Nos. 138, 146, 151]

In 2000, the Boy Scouts of America prevailed in its efforts to exclude from its membership an accomplished assistant scoutmaster because he identified himself as gay in public at a non-Scouting event. The United States Supreme Court held that the Boy Scouts of America, as a private, expressive organization, had a federal constitutional right to exclude from its membership individuals whose inclusion would "significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000). Those protected, private viewpoints include an anti-homosexual, anti-agnostic and anti-atheist stance. In addition to holding these views, the Boy Scouts displays intolerance toward individuals who identify themselves as homosexual, agnostic or atheist by denying membership

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1 to or revoking the membership of gay and nonbelieving individuals. Despite its long-held
2 discriminatory views, the organization has maintained a long-standing relationship with public
3 entities including local and state governments. *Id.* at 651-53; *Boy Scouts of America v. Wyman*,
4 ___ F.3d ___, 2003 WL 21545096 (July 9, 2003 2d. Cir.)(holding that the state did not violate
5 the Boy Scouts' free speech rights by terminating the organization's 30-year participation in a
6 workplace charitable campaign because of its discriminatory membership policy). At issue here
7 is the City of San Diego's long-term lease of prized public parklands to the Boy Scouts. After
8 *Dale*, it is clear that the Boy Scouts of America's strongly held private, discriminatory beliefs are
9 at odds with values requiring tolerance and inclusion in the public realm, and lawsuits like this
10 one are the predictable fallout from the Boy Scouts' victory before the Supreme Court.

11 In this case, Plaintiffs, a lesbian and an agnostic couple and their Boy Scout-aged sons,
12 assert that the City's long-term lease of public parkland to the Boy Scouts is (1) an
13 unconstitutional establishment of religion under the federal and state constitutions, U.S. Const.
14 Am. 1, 14, 42 U.S.C. § 1983; Cal. Const., Art. 1 § 4; (2) violates the state constitution's
15 prohibition against the provision of financial support for religion, Cal. Const., Art. XVI § 5; (3)
16 violates their equal protection rights under the federal and state constitutions, U.S. Const., Am.
17 14, 42 U.S.C. § 1983, Cal. Const. Art. 1 § 7; and (4) violates the City's common law duty to
18 maintain public parkland for the benefit of the general public. Plaintiffs seek a permanent
19 injunction rescinding the leases.

20 Plaintiffs Lori and Lynn Barnes-Wallace and their son and Michael and Valerie Breen
21 and their son (hereinafter, "the Plaintiffs") filed their Cross Motion for Summary Judgment.
22 Defendants City of San Diego (hereinafter, "the City") and Desert-Pacific Council, Boy Scouts
23 of America (hereinafter, "BSA-DPC") have also filed separate Cross Motions for Summary
24 Judgment. Each of the motions is fully-briefed and came on regularly for hearing on March 10,
25 2003. Mark Danis, Andrew Woodmansee, Jordan Budd and M.E. Stephens appeared on behalf
26 of Plaintiffs. John Mullen appeared on behalf of the City, and George Davidson and Scott
27 Christensen appeared on behalf of the Boy Scouts. After hearing oral argument, the Court took
28 the motions under submission.

Background

1
2 One must be heterosexual and swear a belief in a formal deity to be a member or adult
3 leader in the Boy Scouts. *Pls. ' SSUMF* ¶ 18. Although fully aware of the BSA-DPC's
4 discriminatory membership policy, the City leases to it two parcels of public parkland. *BSA-DPC*
5 *Resp. to Pls. ' SSUMF* ¶ 2. The parkland is prized community- and nation-wide. Balboa Park is
6 considered to be the "urban jewel" in the San Diego park system and the "Heart of the City."
7 *BSA-DPC's Resp. to Pls. ' SSUMF* ¶ 4. Mission Bay Park is a unique aquatic recreational
8 resource of major significance and proportions. *Id.* ¶ 21.

9 The City first leased the 18 acre Balboa Park parcel to the BSA-DPC for \$1.00 per year in
10 1957. *Id.* ¶ 8. The purpose of the lease was to construct, operate and maintain a Boy Scout
11 Headquarters and to conduct such exercises thereon as are in keeping with the principle and
12 practices of Boy Scouting, without discrimination as to race, color, or creed. *Pls. ' SSUMF* ¶ 9.
13 The lease further provided that "the public in general shall not be excluded from said premises
14 except at such times as their presence will conflict with the program of Boy Scouting." *BSA-*
15 *DPC's Resp. to Pls. ' SSUMF* ¶ 9.

16 Eight years before the Balboa Parkland lease was to expire, and in the midst of this
17 litigation, the BSA-DPC requested that it and the City negotiate an extension of the lease. *Id.* ¶
18 10. The City's exclusive negotiations with the BSA-DPC culminated in the December 4, 2001
19 vote by the City Council approving a 25-year lease (hereinafter, "the 2002 lease") for a nominal
20 sum and annual administrative fee beginning January 1, 2002 with an option to renew for an
21 additional 15-year term. *Id.* ¶¶ 12, 14. The 2002 lease includes a nondiscrimination clause
22 prohibiting the BSA-DPC from discriminating against persons based on, among other things,
23 religion and sexual orientation. *Id.* ¶ 15. The City agrees that the nondiscrimination clause is
24 understood to apply only to BSA-DPC's regulation of access to the property by non-Scouting
25 individuals and entities. *BSA-DPC's Resp. to Pls. ' SSUMF* ¶ 17.

26 In 1987, the City also entered into a 25-year lease with the BSA-DPC for a half acre
27 parcel of public parkland located on Fiesta Island in Mission Bay Park for no charge. *Id.* ¶ 24.
28 The BSA-DPC constructed an aquatic facility that offers a variety of aquatic-related youth

1 activities. *Id.* ¶¶ 24, 25. The lease also contains the same nondiscrimination clause that appears
2 in the 2002 Balboa Park lease. As with the 2002 Balboa Park lease, the City construes the
3 nondiscrimination clause to apply to the BSA-DPC's regulation of access to the property by non-
4 Scouting individuals and entities. *Id.* ¶ 28.

5 *Discussion*

6 **I. Legal standard**

7 Summary judgment is appropriate if the "pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
9 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
10 of law." Fed. R. Civ. P. 56(c). One of the principle purposes of the rule is to dispose of factually
11 unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A fact is
12 material when, under the governing substantive law, it could affect the outcome of the case.
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732,
14 735 (9th Cir. 1997). Thus, "[d]isputes over irrelevant or unnecessary facts will not preclude a
15 grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d
16 626, 630 (9th Cir. 1987). A dispute about a material fact is genuine if "the evidence is such that
17 a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

18 A party seeking summary judgment always bears the initial burden of establishing the
19 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can
20 satisfy this burden in two ways: by presenting evidence that negates an essential element of the
21 nonmoving party's case, or by demonstrating that the nonmoving party failed to make a showing
22 sufficient to establish an element essential to that party's case on which that party will bear the
23 burden of proof at trial. *Id.* at 322-23. "The district court may limit its review to the documents
24 submitted for the purpose of summary judgment and those parts of the record specifically
25 referenced therein." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030 (9th
26 Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue
27 of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v.*
28 *Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the moving party fails to discharge this

1 initial burden, summary judgment must be denied and the court need not consider the
2 nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

3 If the moving party meets this initial burden, the nonmoving party cannot defeat summary
4 judgment merely by demonstrating "that there is some metaphysical doubt as to the material
5 facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986);
6 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477
7 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmoving party's
8 position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by
9 her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,'
10 designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at
11 324 (quoting Fed. R. Civ. P. 56(e)).

12 When making this determination, the court must view all inferences drawn from the
13 underlying facts in the light most favorable to the nonmoving party. See *Matsushita*, 475 U.S. at
14 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate
15 inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on
16 a motion for summary judgment." *Anderson*, 477 U.S. at 255.

17 **II. Federal Establishment Clause**

18 The federal constitution's Establishment Clause provides that "Congress shall make no
19 law respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court has
20 identified its purpose as prohibition of state sponsorship, financial support and active
21 involvement in religious activity. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The
22 Establishment Clause is therefore not offended by government actions that have a secular
23 purpose, a principal or primary function that does not advance or inhibit religion, and which do
24 not foster an excessive government entanglement with religion. *Id.* at 612-13. At issue here is
25 whether the City's lease of the public parkland to the BSA-DPC has the principal or primary
26 effect of advancing religion.

27 To determine whether government aid has the effect of advancing religion, courts now
28 consider whether the aid program (1) results in governmental indoctrination; (2) defines its

1 recipients by reference to religion; or (3) creates an excessive entanglement.” *Agostini v. Felton*,
2 521 U.S. 203, 234 (1997). When government “aid is allocated on the basis of neutral, secular
3 criteria that neither favor nor disfavor religion, and is made available to both religious and
4 secular beneficiaries on a nondiscriminatory basis,” “the aid is less likely to have the effect of
5 advancing religion” because it is less likely to result in state-sponsored indoctrination or the
6 creation of a symbolic union between government and religion. *Id.* at 231.

7 Three years after *Agostini*, the Supreme Court issued a plurality opinion in another
8 school aid case, *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court held that a federal
9 program providing federal funds to public and private elementary and secondary schools to
10 implement “secular, neutral, and nonideological” programs by providing “services, materials,
11 and equipment” was not a law concerning the establishment of religion. In practice, about one-
12 third of the funds went to private schools, most of which were parochial schools. Justice
13 O’Connor, who wrote the majority opinion in *Agostini*, wrote a concurring opinion in *Mitchell*.
14 The differences between the plurality opinion and Justice O’Connor’s concurrence suggest
15 *Agostini*’s limits.

16 *Agostini* effectively recast *Lemon*’s third prong as but one of the three factors in
17 determining whether a law has the effect of advancing religion, the other two being whether the
18 aid (1) results in governmental indoctrination; or (2) defines its recipients by reference to
19 religion. *Agostini*, 521 U.S. at 234; *Mitchell*, 530 U.S. at 808. Justice Thomas framed the issue of
20 effect as follows: “whether government aid to religious schools results in governmental
21 indoctrination is ultimately a question of whether any religious indoctrination that occurs in
22 those schools could reasonably be attributed to governmental action.” *Mitchell*, 530 U.S. at 809.
23 According to the plurality, if the government aids indoctrination to a broad range of recipients, it
24 cannot be said that the government is responsible for indoctrination by any one recipient. *Id.* In
25 other words, aid is neutral if the religious, irreligious and areligious are equally eligible. *Id.*

26 Justice O’Connor declined to join the plurality opinion, finding that the opinion
27 “announces a rule of unprecedented breadth.” Her concurrence rejects the plurality’s invitation
28 to give the principle of “neutrality” an almost singular degree of importance in Establishment

1 Clause inquiries. *Id.* at 837-38. While Justice O'Connor agrees that neutrality is "an important
2 reason for upholding government-aid programs against Establishment Clause challenges," she
3 disagrees that "a government-aid program passes constitutional muster *solely* because of the
4 neutral criteria it employs as a basis for distributing aid." *Id.* at 839.

5 Despite these reservations, Justice O'Connor agreed with the plurality that the
6 government aid program in *Mitchell* should be upheld. In finding that the program did not define
7 aid recipients by reference to religion, she emphasized the importance of scrutinizing a
8 government-aid program to determine whether the criteria for disbursement of the aid creates a
9 financial incentive to undertake religious indoctrination. *Id.* at 845. No such financial incentive
10 is present "where the aid is allocated on the basis of neutral, secular criteria that neither favor
11 nor disfavor religion, and is made available to both religious and secular beneficiaries on a
12 nondiscriminatory basis." *Id.* at 846 (quoting *Agostini*, 521 U.S. at 231).

13 Plaintiffs argue that the leases have the primary effect of advancing religion because they
14 are aid given directly to a religious organization and are not aid allocated on the basis of neutral,
15 secular criteria. Plaintiffs assert that the leases are naturally perceived by a reasonable observer
16 as an endorsement of the entire regional program of Scouting, which is administered from the
17 Balboa Park property and has as its purpose the inculcation of religious belief and observance in
18 youth. The "reasonable observer" would conclude that the leases are used to advance religious
19 indoctrination. Plaintiff also argues that the leases have the primary effect of advancing religion
20 because they are government aid to a pervasively sectarian organization. The BSA-DPC
21 contends that as a nonsectarian organization, it is beyond the reach of the Establishment Clause,
22 but that even if it were sectarian, the leases satisfy the Establishment Clause because they are
23 part of a program whereby City parkland is offered to a variety of groups, both religious and
24 secular, on a neutral basis for the secular purpose of providing recreational facilities. The City
25 also argues that the "pervasively sectarian" test is no longer persuasive and that the City does not
26 provide any direct funding to the BSA-DPC.

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1 **A. The pervasively sectarian test cannot be reconciled with current Supreme**
2 **Court cases**

3 The Court agrees with Defendants that, although not formally overruled, the pervasively
4 sectarian test cannot be reconciled with the Supreme Court's recent Establishment Clause
5 precedent. According to the pervasively sectarian test, "[a]id normally may be thought to have a
6 primary effect of advancing religion when it flows to an institution in which religion is so
7 pervasive that a substantial portion of its functions are subsumed in the religious mission[.]"
8 *Hunt*, 413 U.S. at 743. Therefore, "no state aid at all [may] go to institutions that are so
9 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2)
10 that if secular activities can be separated out, they alone may be funded." *Roemer v. Bd. of*
11 *Public Works*, 426 U.S. 736, 755 (1976).

12 An organization is "pervasively sectarian" when its religious and secular aspects are
13 inseparable. *Tilton v. Richardson*, 403 U.S. 672, 680 (1971); *Roemer*, 426 U.S. at 759; *Bowen v.*
14 *Kendrick*, 487 U.S. 589, 609-610 (1988). An outright ban on federal grants to church-related
15 colleges and universities is warranted only when "religion so permeates the secular education
16 provided by church-related colleges and universities that their religious and secular educational
17 functions are in fact inseparable." *See Tilton*, 403 U.S. at 680; *see also Roemer*, 426 U.S. 736.
18 The category of organizations that may be called "pervasively sectarian" is narrow. *Mitchell*, 530
19 U.S. at 826 (plurality opinion). Relevant but not conclusive as to whether an organization is
20 pervasively sectarian are (1) explicit corporate ties to a religious faith; (2) by-laws or policies
21 that prohibit any deviation from religious doctrine; and (3) whether the organization is
22 "religiously inspired." *Bowen*, 487 U.S. at 621.

23 Although the pervasively sectarian test has not yet been officially dispensed with, four
24 members of the current Supreme Court have stated explicitly that the pervasively sectarian
25 nature of a government aid recipient is no longer relevant. *Mitchell*, 530 U.S. at 826(plurality
26 opinion); *see also Columbia Union College v. Clarke*, 527 U.S. 1013 (1999)(Thomas, J.,
27 dissenting from denial of petition for writ of certiorari). In calling for its demise, the plurality in
28 *Mitchell* noted that the Supreme Court had not relied on the test to strike down an aid program

1 since 1985 when the Court did so in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of*
2 *Grand Rapids v. Ball*, 473 U.S. 373 (1985), and that the Court had since overruled *Aguilar* in
3 full and *Ball* in part. In *Bowen*, the Court emphasized that the category of organizations that
4 could be called pervasively sectarian was limited and that Justices Kennedy and Scalia had
5 questioned whether the test was “well-founded.” *Id.* at 826-827 (citing *Bowen*, 487 U.S. at 624).
6 The Court has since upheld aid programs to students who attended pervasively sectarian schools,
7 despite dissents arguing the relevance of the pervasively sectarian doctrine. *Id.* at 827.

8 Plaintiffs nonetheless urge this Court to follow the suggested lead of the majority in
9 *Steele v. Industrial Development Bd. of Metropolitan Gov't Nashville*, 301 F.3d 401, 408-409
10 (6th Cir. 2002). The *Steele* court indicated in dicta that were it necessary it would apply the
11 pervasively sectarian test despite its questionable vitality because (1) it has not yet been
12 explicitly rejected by the Supreme Court, (2) the Supreme Court instructs lower courts to treat its
13 prior cases as controlling unless the Supreme Court itself specifically overrules them and (3)
14 *Mitchell*, the more recent Supreme Court case apparently relied on by the district court, was a
15 plurality opinion and therefore binding only as to its holding. *Id.* at 408-409. The *Steele* court
16 held that the government bond program in question did not violate the Establishment Clause
17 because it was part of a neutral program available to sectarian and secular schools and conferred
18 only an indirect benefit on the sectarian schools. *Id.* at 416. This Court, like the *Steele* Court,
19 finds it unnecessary to apply the pervasively sectarian test.

20 This Court also reads the concurrence in *Mitchell* as squarely contradicting the
21 pervasively sectarian test. The test simply cannot be reconciled with the plurality or the
22 concurrence, which would not object to aid that “flows to an institution in which religion is so
23 pervasive that a substantial portion of its functions are subsumed in the religious mission,” *Hunt*,
24 413 U.S. at 743, so long as it does so by way of “a true private-choice program” whereby aid is
25 dispersed to individuals who then elect to use it at a particular organization, be it secular or
26 sectarian. *Mitchell*, 530 U.S. at 842. Justice O’Connor explains that with a per capita school aid
27 program,

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1 if the religious school uses the aid to inculcate religion in its students, it is
2 reasonable to say that the government has communicated a message of
3 endorsement. Because the religious indoctrination is supported by government
4 assistance, the reasonable observer would naturally perceive the aid program as
5 *government* support for the advancement of religion. . . . In contrast, when
6 government aid supports a school's religious mission only because of independent
7 decisions made by numerous individuals to guide their secular aid to that school,
8 no reasonable observer is likely to draw from the facts . . . an inference that the
9 State itself is endorsing a religious practice or belief.

10 *Id.* at 843 (emphasis in original) (quotations omitted). Justice O'Connor thus makes it clear that
11 the fact that an organization receiving aid is "pervasively sectarian" is not determinative. This
12 view of the Establishment Clause is irreconcilable with the view expressed in *Hunt*, where it is
13 assumed that aid has the primary effect of advancing religion when it flows to a pervasively
14 sectarian organization. *Hunt v. McNair*, 413 U.S. 734, 743 (1973). This Court therefore
15 concludes that the Supreme Court has effectively, if not explicitly, overruled use of the
16 pervasively sectarian test. The correct inquiry here, under recent Supreme Court precedent, is
17 whether government aid has the effect of advancing religion because the leases either result in
18 governmental indoctrination or define their recipient by reference to religion. *Agostini*, 521 U.S.
19 at 234. While neutrality alone does not guarantee constitutionality on either of these grounds, it
20 is a threshold factor that must be met when the government awards aid to religious organization.
21 *Mitchell*, 530 U.S. at 809, 838.

22 **B. A reasonable observer would perceive an advancement of religion as a result**
23 **of the City's failure to use a neutral process in selecting lessees**

24 Whether a reasonable observer would perceive an advancement of religion as a result of
25 the leases depends on whether the leases have been made available on a neutral basis. According
26 to Plaintiffs', the reasonable observer "would naturally perceive the leases as an endorsement of
27 the entire regional program of Scouting itself, which is administered from Balboa Park and has,
28 as its fundamental and pervasive purpose, the inculcation of religious belief and observance."

Pls.' Mem. P. & A. at 19.

When determining whether an aid program has the primary effect of advancing religion,
the Court asks whether a "reasonable observer" would perceive an advancement of religion
through government aid. *Mitchell*, 530 U.S. at 843; *Capitol Square Review and Advisory Board*

1 *v. Pinette*, 515 U.S. 753, 780 (1995); *Witters v. Washington Dep't of Services for the Blind*, 474
2 U.S. 481, 493 (1986). The "reasonable observer" perspective establishes at least some measure
3 of objectivity because the "reasonable observer" is "deemed aware of the history and context of
4 the community and forum" in which the Establishment Clause challenge arises. *See Good News*
5 *Club v. Millford Central School*, 533 U.S. 98, 119 (2001); *see also Pinette*, 515 U.S. at 780.

6 **1. The Boy Scouts are a religious organization**

7 As an initial matter, the Boy Scouts is a religious organization with a "religious purpose"
8 and a "faith-based mission to serve young people and their families." *BSA-DPC Resp. to Pls.*
9 *SSUMF* ¶¶ 166, 168, 184-187. Adult leaders and youth members of the BSA-DPC are required
10 to have a belief in a formal deity, to swear a duty to God. *Id.* ¶¶ 161, 169, 171, 173, 174, 176-
11 181, 183, 190, 192. Belief in God is and always has been central to BSA's principles and
12 purposes. *Id.* ¶ 164. Adult leaders are expected to reinforce in Scouts the values of duty to God
13 and reverence. *Id.* ¶ 235.

14 Scouting is referred to as "the 'sleeping giant of outreach' for local churches. *Id.* ¶ 232.
15 Scouting offers the church "unparalleled training, materials and facility support," such as camps.
16 *Id.* "There are few religions in America which can boast of millions of youth who meet each
17 week and openly affirm their belief in God." *Id.* ¶ 191. "Because of Scouting's devotion to the
18 spiritual element of character education and its willingness to submerge itself in the religious
19 traditions of its sponsors, America's churches and synagogues enthusiastically [have] embraced
20 Scouting." *Id.* ¶ 233. The undisputed facts thus show that the BSA engages in religious, albeit
21 nondenominational, instruction through its various Scout oaths, religious emblems program,
22 chaplaincy program, Religious Relationships Committee, religious publications and the
23 integration of religion in Scouting activities.

24 Scouting activities are intended to further the BSA's religious purpose and faith-based
25 mission. According to the BSA's Chaplain's guide for Scout's Camp, the camp program offers
26 opportunities for the daily practice of religion by each individual, such as grace before meals,
27 opportunity for prayer and meditation during the day, and a period of quiet time before Taps for
28 campers accustomed to saying prayers before retiring. *Id.* ¶¶ 194. The spirit of Scout's Camp is

1 “that the spiritual life of the campers is strengthened, with the result that they return home with a
2 deeper sense of reverence and a firmer desire to be faithful in religious responsibilities.” *Id.* ¶
3 195. Scouting’s outdoor program further reinforces the religious nature of the Scouting program.
4 Scout outings and other activities that span weekends should include an opportunity for members
5 to meet their religious obligations. *Id.* ¶ 196.

6 To advance up the ranks in the BSA, Scouts must fulfill the program’s “Duty to God”
7 requirements. *Id.* ¶¶ 197-99. The BSA’s “A Resource Booklet for Interfaith Prayers and
8 Devotionals,” provides for an interfaith service “for the worship of God and to promote fuller
9 realization of the Scout Law and Promise.” *Id.* ¶¶ 201-202. Scouts say grace in unison at meals,
10 although no one individual is compelled to participate. *Id.* ¶¶ 203, 204. The BSA states that “it is
11 highly important that grace at meals be conducted with reverence.” *Id.* ¶ 203.

12 According to the BSA-DPC’s website, the religious emblems programs are key spiritual
13 components of the Scouting movement. *Id.* ¶¶ 205, 206. The religious emblems program is
14 supervised and reviewed by the Religious Relationships Committee, which reports on religious
15 subjects. *Id.* ¶ 215. BSA Chaplains promote interest in religious emblems programs by
16 “inquir[ing] in casual conversation whether [Scouts] are working on an emblem,” having “a
17 supply of pamphlets or take-home fliers . . . available perhaps in [their] pocket as [they] wander
18 around the camp, preparing a vesper service based on religious emblems, scheduling a talk on
19 religious emblems, etc.” *Id.* ¶ 208. The emblems are worn on Scouting uniforms. *Id.* ¶ 209-212.
20 The BSA’s magazine, “Boy’s Life,” includes columns devoted to various religious emblems. *Id.*
21 ¶ 213.

22 The Religious Relationships Committee also reviews religious portions of Scouting
23 literature and publications and the BSA chaplain program. *Id.* ¶ 216. The members of the BSA-
24 DPC Religious Relationships Committee serve as liaisons between the BSA-DPC and
25 community religious organizations; interpret and promote the Scouting program and the
26 religious emblems program in churches, mosques, synagogues, and other religious organizations
27 as a resource for their children, youth, adult and family ministries; and provide chaplain support
28 during campouts and other events and activities. *Id.* ¶ 244. The BSA has an annual

1 "Relationships Week" national conference addressing topics such as "Scouting in the Catholic
2 Church," "United Methodist Scouters Workshop," "Scouting Serves the Jewish Community,"
3 Scouting in the Lutheran Church," and "Scouting in the Church's Ministry." *Id.* ¶ 217. In 2001,
4 "Relationships Week" included tips on the use of Scouting programs for outreach and ministry
5 to Catholic, Jewish and Protestant youth. *Id.* ¶ 218. The BSA-DPC board has a Religious
6 Relationships Committee which works to provide Scouts of all religions information and support
7 on how Scouting works religion into its programs. *Id.* ¶ 243.

8 Some of the purposes of the BSA Chaplaincy program are to provide worship service,
9 promote the religious emblems programs of all faiths, help develop a reverent climate for the
10 camping experience and help campers and staff grow in their relationships with God and with
11 each other. *Id.* ¶ 221. Scout chaplains are "responsible for the supervision of spiritual activities
12 and for creating an environment where the 12th point of Scout Law, 'A Scout is Reverent,' can
13 thrive." *Id.* ¶ 220. The BSA provided more than 100 ordained ministers to the 2001 National
14 Scout Jamboree. *Id.* ¶ 223. The BSA has approved of the Chaplain Aide as a youth leadership
15 position. *Id.* ¶ 224. The Chaplain Aide should (1) work with the troop chaplain to plan interfaith
16 religious services during troop outings; (2) encourage troop members to strengthen their own
17 relationship with God through personal prayer and devotion and participation in religious
18 activities appropriate to their faith; (3) participate in planning sessions to ensure that a spiritual
19 emphasis is included in troop activities; (4) help the troop chaplain (or other adult) plan and
20 conduct an annual Scout-oriented religious observance, preferably during Scout Week in
21 February; and (5) help the troop chaplain (or other adult) recognize troop members who receive
22 their religious emblems. *Id.* ¶ 225.

23 Each year, BSA designates a Sunday as "Scout Sunday" to recognize contributions of
24 youth and adults to Scouting through a "Worship Service." *Id.* ¶ 228. The BSA publishes "A
25 Scout is Reverent: Scout Sunday Observance," which provides the format for church services on
26 Scout Sunday. Included in this booklet are prayers, hymns, scripture readings, benedictions and a
27 suggested article for the church bulletin titled "Bringing Youth to Christ Through a Scouting
28

1 Ministry.” *Id.* The BSA also publishes the Boy Scout Songbook, which includes religious
2 hymns and prayers and several religious booklets, *Id.* ¶ 229-30.

3 The BSA-DPC’s Duty to God policy statement describes the interfaith service as follows:
4 “Such services typically include the basic ingredients of prayer, relationship to a Creator,
5 thankfulness, a short meaningful story or anecdote to illustrate a point, and use of universal
6 religious terms so that all Scouts can feel spiritually enriched, regardless of creed. Invocations,
7 program content, and benedictions at Scouting sponsored interfaith worship services should be
8 non faith-specific in nature and content.” *Id.* ¶ 246. The BSA-DPC publishes a column in its
9 newsletter “The Beaver Log” called “Religious Relationship News.” *Id.* ¶ 247. The newsletter is
10 published on and distributed from the Balboa parkland property. *Id.* ¶ 247. The Winter 2002
11 issue devoted a page to religious news; congratulated Scouts who had earned religious emblems;
12 described the religious emblems program and listed speakers available to promote the program;
13 and contained a display ad for Christian Community theater’s new season of plays. *Id.* The
14 BSA-DPC has also published a booklet called “Interfaith Prayers and Devotionals.” *Id.* ¶ 248.
15 The Scout Shop sells manuals for the religious emblems programs. *Id.* ¶ 249. The BSA-DPC
16 website maintains a religious relationships page and a link to the website P.R.A.Y. (Programs
17 and Religious Activities with Youth) where Scouts can purchase religious materials. *Id.* ¶ 251.

18 The overwhelming and uncontradicted evidence shows that the BSA’s purpose and
19 practices are religious.¹ The Defendants nonetheless argue that the BSA-DPC’s principal or
20 primary mission is not religious because it is not a religion per se, since it operates only in
21 accordance with the belief that children cannot be the best kind of citizen unless they believe in
22 God. Defendants cite to two lines of cases in support of their argument. First, they cite to cases
23 in which courts sought to define what may or may not be considered “a religion” in contexts not
24 analogous to that here. *See Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996)(holding in
25 part that New Age is not a religion and that the City did not violate the Establishment clause by

26
27 ¹ The Court notes that the BSA-DPC elected to dismantle its Scout Chapel after the
28 Plaintiffs initiated their litigation. *BSA-DPC’s Resp. to Pls.’ SSUMF* ¶ 99. The chapel was an
enclosed circular area with benches for seating and a lectern at the front. Attached to the lectern was a
sign reading “A Scout is Reverent.” The chapel was adorned with a sign calling it the “Camp Balboa
Chapel.” *Id.* The BSA-DPC is building a climbing wall in its place. *Id.*

1 commissioning a statute of Quetzalcoatl, a New Age symbol, to commemorate Mexican and
2 Spanish contributions to the City's culture); *Afrika v. Commonwealth of Pennsylvania*, 662 F.2d
3 1025 (3d Cir. 1981)(holding that prisoner alleging that he was a "Naturalist Minister" of the
4 "MOVE organization" was not entitled to a special religious diet in part because the "MOVE
5 organization" is not a religion). In these cases, the courts were confronted with the question of
6 whether an unconventional organization or movement not requiring that its members espouse a
7 belief in a formal deity was "a religion" triggering free exercise rights, *Afrika*, 622 F.2d at 1036,
8 or raising Establishment Clause concerns. *Alvarado* 94 F.3d at 1232. Neither case supports
9 Defendants' argument that a nonsectarian religious organization with the requirement that its
10 members declare a belief in a formal deity is exempt from Establishment Clause concerns.
11 Contrary to Defendants' argument, it is well-established that the Establishment Clause prohibits
12 government from endorsing religious belief over nonbelief. See *County of Allegheny v. ACLU*,
13 492 U.S. 573, 590 (1989) (the Establishment Clause is "recognized as guaranteeing religious
14 liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith"); *Wallace*
15 *v. Jaffree*, 105 S.Ct. 2479, 2479 (1985)(government is precluded "from conveying or attempting
16 to convey a message that religion or a particular religious belief is favored or preferred");
17 *Everson v. Bd. of Educ. of Ewing TP*, 67 S.Ct. 504, 513 (1947)(the First Amendment "requires
18 the state to be neutral in its relations with groups of religious believers and nonbelievers");
19 *Kreisner v. City of San Diego*, 1 F.3d 775, 783 (9th Cir. 1993)(stating that the relevant inquiry is
20 "whether the government's action actually conveys a message of endorsement of religion in
21 general or of a particular religion.")

22 Defendants also cite to cases holding that the Boy Scouts of America does not meet the
23 definition of a religious organization for various purposes, including federal tax exemptions. The
24 Court bases its finding on this issue on the overwhelming record developed for the purpose of
25 litigating this case. Not only does the BSA-DPC concede that it is a religious organization, but it
26 insists that its religiosity is fundamental to its purpose and mission of instilling values in its
27 youth members. *BSA-DPC's Resp. to Pls.' SSUMF* ¶¶ 166, 168, 186. Based on the
28 organization's own admission and the overwhelming record in this case, the Court finds that the

1 BSA-DPC is a religious organization and that the City's lease of the parkland to the religious
2 organization raises Establishment Clause concerns.

3 **2. The City did not lease the Balboa Park property to the BSA-DPC by**
4 **way of a religion-neutral process**

5 The parties agree that whether the leases were obtained on a religion-neutral basis is the
6 crux of this dispute. Defendants view the leases as only two leases out of over 100 leases of
7 public land by the City. They argue that the BSA-DPC became the City's lessee by way of a
8 neutral program through which the City leases publicly-owned land to "well over 100 nonprofit
9 groups to advance the educational, cultural and recreational interests of the City" without regard
10 to whether the lessees are religious. *City's Mem. P. & A. in Opp. to Pls.' Mot. for Summ. J.* at 7
11 (citing Rothans Decl. ¶ 19).

12 The Court agrees with Plaintiffs that the City's leases with other organizations are
13 irrelevant because there is no evidence that the parkland leases were negotiated as part of any
14 leasing "program." Defendants do not point to any program criteria to which the City adheres
15 when it leases public property, but instead rely on the bare fact that the City leases land to a large
16 number of nonprofits. While the City does lease property to a large number of non-profits, *Pls.'*
17 *Resp. to Defs.' SSUMF* ¶ 63, the undisputed evidence shows that the Balboa Park lease is not the
18 result of a selection process by which any other entities had the opportunity to compete with the
19 BSA-DPC, but is instead the result of exclusive negotiations between the City and the BSA-
20 DPC. The City Council voted on December 4, 2001, eight years before the 1957 lease expired, to
21 continue leasing the property to the BSA-DPC, *id.* ¶ 13, after this lawsuit was filed, after the
22 BSA-DPC approached the City and requested negotiations to extend the lease and after hearing
23 extensive public comment regarding the Boy Scouts discriminatory policies. *Id.* ¶ 10; *BSA-*
24 *DPC's Resp. to Pls.' SSUMF* ¶¶ 29-36. On the other hand, neither the City nor the BSA-DPC
25 has presented the Court with any evidence regarding the process by which the Fiesta Island lease
26 was obtained. While there is one reference to the participation of a variety of youth-serving
27 organizations' participation in the creation of the Youth Aquatic Center, *Roy Decl.* ¶ 12, this is
28 not sufficient to demonstrate neutrality in the leasing of the property itself.

1 The City does have an established process by which City properties are put up for lease,
2 but which was not used in the 2002 lease of the Balboa Park property to the BSA-DPC. *Transc.*,
3 *March 10, 2003 hearing on Cross-Mot. 's for Summ. J.* at 21:18-24. In his deposition, William
4 T. Griffith, the City's Real Estate Assets director, testified at length regarding the process by
5 which the City determines to whom it will lease its public lands. After Real Estate Assets
6 decides that a property is available for leasing, it goes to a committee of the City Council to "get
7 some direction with what they would like us to do with the property." *Cacciavillani Decl. Ex.*
8 *11, Griffith Dep.* 91:6-92:4. At that point, Real Estate Assets may either solicit interest in the
9 property by doing a request for proposal ("RFP") that includes selection criteria or, recommend
10 an exclusive negotiation with a particular prospective lessee. *Id.* 92:5-93:10; 93:16 - 94:8. More
11 often than not, the process is competitive and the City generates as much interest as it can by
12 doing an RFP or comparable procedure. *Id.* 93:11-15. When deciding which prospective lessee
13 should receive a non-revenue lease, the City looks at a list of factors, including the proposal,
14 how it serves the public or particular need, whether it adds employment or sales tax, the benefits
15 to the community, the services that the lessee would provide, who the lessee serves in the
16 community, the lessee's mission statement, funding and level of professionalism. *Id.* 94:9-95:16;
17 105:20-106:11. According to Mr. Griffith, "[t]here's not a lot of encouraging that [the City]
18 need[s] to do in the sense of, hey, we want you to come to the park. I think it's more an issue of
19 - of almost the selection criteria. . . . There are organizations that would like to get into the park
20 that there is not space available." *Id.* 139:19-140:7. Ultimately, the Mayor and the City Council
21 decide whether to approve a lease based on information provided them by Real Estate Assets. *Id.*
22 95:17-20; 107:3-12. The Mayor and City Council also provide guidance to Real Estate Assets
23 through the process and, via the City Manager, make recommendations whether to enter into
24 exclusive negotiations with a particular organization. *Id.* 95:21-96:6. From the outset, Real
25 Estate Assets tries to get a sense from the Mayor and City Council whether they want to
26 negotiate with a particular organization, in which case Real Estate Assets recommends to the
27 City Council or City Council committee that it enter into exclusive negotiations with that
28 organization. *Id.* 108:14-109:6.

1 The City Council renewed the 2002 Balboa parkland lease 8 years before the 1957 lease
2 expired. Mr. Griffith testified in his deposition that the negotiations concerning the new or
3 renewed lease were effectively the same as exclusive negotiations. *Id.* 133:20-10; 134:23-135:5.
4 The City's RFP process for generating interest and soliciting competitive bids was not
5 implemented. *Id.* 134:11-13. Instead, Real Estate Assets was "given direction to negotiate an
6 extension of [the DPC-BSA's] –or a renegotiation of their existing lease for [an] additional term
7 on the lease of years – term of years on the lease. And since that authorization was given, they
8 were – there was six or seven years left on the term of their lease. It would have the same effect.
9 We couldn't have done an RFP at that point because there was six or seven years left on their
10 lease. So I don't think the – we actually requested an exclusive negotiation because we couldn't
11 have negotiated with anyone else for seven – seven years anyway." *Id.* 135:6-20.

12 The BSA-DPC disputes Plaintiffs' statement that the City entered into exclusive
13 negotiations with the Boy Scouts, arguing that "[n]o other party has ever approached the city
14 with an interest in leasing Camp Balboa." *Pls. ' Resp. to Defs. ' SSUMF ¶ 12.* At oral argument,
15 counsel for the City stated that

16 the City Manager did negotiate exclusively with the Boy Scouts for the City of San
17 Diego for the Camp Balboa lease. That did not prevent any other organization
18 from submitting a bid. There was an extensive public hearing on the City
19 Council's decision, on December 4, whether to renew these leases, or the Camp
20 Balboa lease. There were dozens and dozens of speakers. . . . Any organization,
21 youth-serving or otherwise, could have come in and said, 'we can make a better
22 deal than the Boy Scouts made.' The exclusive negotiations were between the
23 manager and the Desert Pacific Council. The City Council had the final decision
24 after a public hearing. There was a noticed public hearing. All comers could have
25 come and offered a better deal, should they have chosen to do so. While I
26 appreciate the fact that these were exclusive negotiations, that doesn't preclude the
27 fact of opportunity for some other group to come in and say, 'we could do better,'
28 and no one did.

23 *See Transc., March 10, 2003 Hrg. on Cross-Mots. ' for Summ. J. at 20:18-2112.* The burden,
24 however, was on the City to take affirmative steps to avoid an Establishment Clause violation by
25 making the lease available to the religious, areligious and irreligious on a neutral basis.

26 Rather than provide all interested organizations a meaningful opportunity to demonstrate
27 their respective capacities for providing the desired service, the City provided not even the
28 pretense of neutrality. Its reliance on the public's right to speak at the City Council meeting in

1 opposition to the lease, which was already negotiated and on the meeting agenda for final
2 approval, does not provide competing organizations a real opportunity to lease the property. By
3 entering into exclusive negotiations with the BSA-DPC without affording others a real
4 opportunity to compete, the City effectively prevented any secular groups from having an
5 opportunity to obtain the benefit. The City handpicked as the preferred lessee an organization
6 that describes religious belief and practice as fundamental to the services it provides. A
7 reasonable observer would most naturally view the exclusive negotiations and effective
8 preclusion of secular groups as the City's endorsement of the BSA-DPC because of its
9 inherently religious program and practices.

10 The material undisputed facts accordingly show that the Balboa Park lease violates the
11 federal Establishment Clause. Plaintiffs' Motion for Summary Judgment on this claim is
12 therefore **GRANTED** as to the Balboa Park lease. The Plaintiffs' and Defendants' Cross-
13 Motions for Summary Judgment are **DENIED** regarding Plaintiffs' claim that the Fiesta Island
14 lease violates the federal Establishment Clause because none of the parties have presented any
15 evidence regarding the process by which the City leased the Fiesta Island property to the BSA-
16 DPC.

17 **II. California Constitution's Religion Clauses**

18 The California Constitution contains two clauses concerning separation of church and
19 state that are in issue here: (1) the No Preference Clause in Article I, section 4; and (2) the No
20 Aid Clause in article XVI, section 5. They are addressed independently of Plaintiff's federal
21 Establishment Clause claim because "state courts have not limited their interpretation of the
22 California Constitution to the United State's Supreme Court's interpretation of the federal
23 constitution." *Hewitt v. Joyner*, 940 F.2d 1561, 1566 (1991). "[T]he state courts have developed
24 a body of law regarding the appropriate relationship between religion and the state which is
25 independent from that of federal courts." *Id.* at 1565.

26 **A. The No Preference Clause**

27 The state constitution guarantees the "[f]ree exercise and enjoyment of religion without
28 discrimination or preference" and prohibits the state legislature from making a "law respecting

1 an establishment of religion.” Cal. Const. Art. I, sec. 4. California courts have repeatedly
2 indicated that the state’s establishment clause is broader than the federal establishment clause
3 due to its “no preference” clause. *East Bay Asian Local Development Corp. v. California*, 24
4 Cal.4th 693, 719-20 (2000). That clause is satisfied when the government action in question does
5 not endorse the religious views and beliefs of a particular religion or give “favored status to
6 religion in general.” *Christian Science Reading Room Jointly Maintained v. City and County of*
7 *San Francisco*, 784 F.2d 1010, 1014, 1015 (9th Cir. 1986). Even an appearance of preference is
8 prohibited and whether the government’s action has a secular purpose is irrelevant. *Hewitt v.*
9 *Joyner*, 940 F.2d 1561, 1567, 1569 (9th Cir. 1991). Public entities are subjected to a “demanding
10 standard of constitutional compliance.” *Murphy v. Bilbray*, 782 F.Supp. 1420, 1429 (S.D. Cal.)
11 (Thompson, J.), *aff’d sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

12 The state supreme court most recently applied the No Preference Clause in *East Bay*
13 *Asian Local Development Corp.* Nonprofit organizations challenged as unconstitutional a state
14 law granting religiously affiliated organizations the power to declare themselves exempt from
15 historic preservation laws if they can determine in a public forum that the organization would
16 suffer a substantial hardship if the property were designated a historic landmark. Plaintiffs
17 argued that the statutes violated the No Preference Clause and the No Aid Clause.

18 *East Bay* holds that the No Preference Clause does not disallow state exemptions for
19 religious organizations from state laws that would, if no exemption were provided, abridge those
20 organizations’ free exercise of religion. *Id.* at 720; *Catholic Charities of Sacramento, Inc. v.*
21 *Superior Court*, 109 Cal. Rptr.2d 176, 189 (2001). While the lead opinion declined to
22 definitively construe the No Preference Clause, it did provide that “the plain language of the
23 clause suggests . . . that the intent is to ensure that free exercise of religion is guaranteed
24 regardless of the religious nature of the religious belief professed, and that the state neither
25 favors nor discriminates against religion.” *East Bay*, 24 Cal.4th at 719. *East Bay* is therefore of
26 no real assistance here, since the state supreme court declined to definitively construe the No
27 Preference Clause and the Plaintiffs here do not challenge as unconstitutional an exemption in
28 protection of free exercise.

1 *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218
2 Cal. App.3d 79 (1990), provides guidance. In *Woodland Hills*, a homeowners organization
3 challenged a community college district's long term lease of property to a religious congregation
4 to develop for its religious, educational and private use. Plaintiff challenged the lease as a
5 violation of the no preference and No Aid Clauses. The Court of Appeal held that the lease did
6 not violate the state constitution because the record was devoid of evidence that the lease
7 advanced or aided Judaism or religion generally, and "[t]he District never took a stance, public
8 or privately, favoring the Congregation over other religious groups or favoring the letting of the
9 parcel only to a religious group." *Id.* at 93-34.

10 The process by which the District decided to offer the parcel for lease, made the
11 opportunity known to prospective lessees, determined the tentative terms on which the property
12 would be leased and then made the final lease award was public and inclusive so that its
13 outcome was devoid of even an appearance that the District favored the congregation throughout
14 the process. The District's board of trustees initially decided to offer the surplus land for sale to
15 raise finances. When it did not sell, it decided to lease its surplus property. The Board voted to
16 adopt a resolution that the land was offered on a long term lease for no longer than 75 years and
17 for specified uses for a minimum of three million dollars. *Id.* at 85. Notice that the land was
18 available to lease was (1) posted at City Hall, the county administration building and the county
19 courthouse; (2) published in a local Daily Journal for three non-consecutive days; (3) mailed to
20 about 275 people on the District's real property mailing list; and (4) reported about in
21 newspapers, including on the front page of the City's newspaper and in the plaintiff's own
22 newsletter. *Id.* at 85-86. The District mailed bid packages at the request of 41 interested bidders
23 and held a written bid opening and an opportunity for oral bidding. The congregation's bid was
24 the only bid received. The board reviewed and approved it. The District and the congregation
25 entered a 75-year lease for three million and twenty-five thousand dollars. *Id.* at 86.

26 Here, as is set forth above, the City engaged in private, exclusive negotiations
27 culminating in another long term lease of the Balboa Park property in the midst of this litigation
28 and despite public outcry. More important in this context, the City determined to re-lease the

1 property to the BSA-DPC, engaged in exclusive negotiations with the organization and re-leased
2 the property to the organization without ever implementing its own process by which it puts
3 properties up for lease.² *Transc., March 10, 2003 Hrg. on Cross-Mot. 's for Summ. J.* at 21:18-
4 24. Public comment was not heard until the City and the BSA-DPC had already negotiated the
5 material terms of the lease. Given that context, Defendants contention that other organizations
6 were not prevented from submitting a bid sounds particularly disingenuous. *See Transc., March*
7 *10, 2003 Hrg. on Cross-Mot. 's for Summ. J.* at 20:18-2112. By failing to make it publicly known
8 that the land was available for lease, the City effectively precluded any competing offers.

9 In practical terms, the City has bestowed upon the BSA-DPC—an admittedly religious,
10 albeit nonsectarian, and discriminatory organization— the benefits of (1) valuable parkland for a
11 nominal fee despite the City's written policy against leasing that very property to discriminatory
12 organizations, *BSA-DPC's Resp. to Pls.' SSUMF* ¶¶ 57-58; (2) with the accommodation that the
13 City will not apply the leases' nondiscrimination clauses to the organization's membership, *id.*
14 ¶¶ 15, 16, 59; (3) with the authority to exclusively occupy portions of the leased parkland for the
15 purpose of administering the BSA-DPC's regional program and operating endeavors such as the
16 print shop and the revenue-earning Scout Shop with about \$1 million per year in net sales, *id.* ¶¶
17 75-77, 79, 83-88, 90, 104-109; and (4) the authority to charge the public user fees which are
18 deposited into the general operating account and not designated for administration or upkeep of
19 the leased properties.³ *Id.* ¶ 114, 117, 118. As is set forth above, the City selected the BSA-DPC
20 to receive the benefit of the lease without public notice and an inclusive selection process. This
21 preferential treatment has at least the appearance, if not the actual effect, of government
22 advancement of religion generally and government endorsement of an organization whose

24 ² The City's process for offering properties for lease was not implemented and whether
25 compliance with it would have satisfied the City's obligations under the federal or state constitution is
not considered here.

26 ³ Individuals not eligible for membership in the Boy Scouts, including agnostics and
27 atheists, have the take-it-or-leave-it option of forgoing use of public parkland or paying usage fees to the
discriminatory organization. The BSA-DPC maintains that the fees cover the costs of operating the
28 facility. *BSA-DPC's Resp. to Pls.' SSUMF* ¶ 114-118. There is disputed evidence that the BSA-DPC
charges Non-BSA-DPC campers a higher usage fee. *Id.* ¶ 114. The BSA-DPC cites to deposition
testimony that Scouts and non-Scouts pay the same fee. *Id.*

1 religiosity is fundamental to its provision of youth services in violation of the state constitution's
2 No Preference Clause. Plaintiffs' Motion for Summary Judgment as the claim for violation of
3 the state constitution's No Preference Clause is **GRANTED** as to the Balboa Park lease. Again,
4 because none of the parties here presented any evidence concerning the process by which the
5 City leased the Fiesta Island property to the BSA-DPC, all Cross-Motions for Summary
6 Judgment are **DENIED** as to Plaintiffs claim that the Fiesta Island lease violates the state
7 constitution's No Preference Clause.

8 **B. The No Aid Clause**

9 The state constitution also provides that no city

10 [1] shall ever make an appropriation, or pay from any public fund whatever, or
11 grant anything [2] to or in aid of any religious sect, church, creed, or sectarian
12 purpose, . . . nor shall any grant or donation of personal property or real estate ever
13 be made by . . . any city . . . for any religious creed, church, or sectarian purpose
14 whatever.

15 Cal. Const. Art XVI, sec. 5. "[T]he test of the provision has enormous breadth. It is possible for
16 the government's transfer of 'anything' to violate the provision if the transfer is 'in aid of' any
17 'sectarian purpose.'" *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th Cir. 2002)(en
18 banc). Whether the aid, which need not be financial or tangible, has a secular purpose is
19 irrelevant. *Id.* at 1130. The clause "bans any official involvement, whatever its form, which has
20 the direct, immediate, and substantial effect of promoting religious purposes." *Id.* See also
21 *Christian Science Reading Room*, 784 F.2d at 1016; *California Educational Facilities Authority*
22 *v. Priest*, 12 Cal.3d 593, 605 (1974). As such, it is "the definitive statement of the principle of
23 government impartiality in the field of religion." *Priest*, 12 Cal.3d at 604. It is "intended by its
24 framers 'to guarantee that the power, authority, and financial resources of the government shall
25 never be devoted to the advancement or support of religious or sectarian purposes.'" *Id.*; see also
26 *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002).

27 The parties do not dispute that the City has granted the BSA-DPC a benefit by leasing the
28 subject properties to the organization for its own and the public's use. The issue, then, is whether
the leases are aid to a religious purpose and, if so, whether the benefit is "indirect, remote or
incidental." Defendants argue that the BSA-DPC has no religious purpose because it is a non-

1 sectarian organization. Defendants cite to no authority, and the Court is unaware of any
2 authority, restricting application of the No Aid Clause to instances where the government aid
3 promotes the purposes of one religion over those of another. Although the clause itself refers to
4 "sectarian purposes," California courts and the Ninth Circuit have consistently and for many
5 years interpreted the clause as prohibiting aid to "religious purposes" and, when using the word
6 "sectarian" have used it synonymously with "religious." See e.g., *Paulson*, 294 F.3d at 1130-31;
7 *East Bay*, 24 Cal.4th at 720; *Woodland Hills Homeowners Organization*, 218 Cal. App.3d at 93;
8 *Priest*, 12 Cal.3d at 605. Those same courts have also recognized that all groups, including those
9 opposed to organized religion, may be offended by governmental aid to a religious purpose.
10 *Paulson*, 294 F.3d at 1131. That the BSA-DPC is a religious organization that promotes
11 religious belief and religious practices in general is undisputed and amply supported by the
12 record. That it is a non-sectarian organization and whether it conducts religious activities in
13 accordance with one particular faith is immaterial.

14 Still, the leases do not violate the No Aid Clause if the benefit to the BSA-DPC is
15 "properly characterized as indirect, remote, or incidental." *Paulson*, 294 F.3d at 1131. The
16 benefit "may qualify as 'incidental' if the benefit is available on an equal basis to those with
17 sectarian and those with secular objectives." *Id.* The parties agree that *Woodland Hills*
18 *Homeowners Organization* and *Christian Science Reading Room* are the pivotal cases. As is set
19 forth above, the California Court of Appeal found in *Woodland Hills Homeowners Organization*
20 that the neutral process by which the community college district leased the land to the
21 Congregation safeguarded it from any appearance that it had favored Judaism or religion
22 generally. For that reason, the lease did not violate the no preference or No Aid Clauses of the
23 state constitution.

24 The Ninth Circuit likewise held in *Christian Science Reading Room* that the Airport's
25 rental of commercial space in its terminal to the Reading room was an arm's length transaction
26 and that the policy by which it rented space to various entities "did not favor or prefer any
27 individual religion, or religion as a whole." *Christian Science Reading Room v. City and County*
28 *of San Francisco*, 784 F.2d at 1015-16. The benefit to the Reading Room was therefore indirect

1 and incidental to the lease itself. *Id.* at 1016. For the same reasons set forth above, the BSA-DPC
2 did not enter into the Balboa Park lease as the result of an arm's length transaction. Instead, the
3 City selected the BSA-DPC for favored status. The aid enjoyed by the BSA-DPC as a result of
4 that lease may therefore not be characterized as "indirect, remote or incidental." Whether the aid
5 enjoyed by the BSA-DPC as a result of the Fiesta Island lease is "indirect, remote or incidental"
6 is, on the other hand, indeterminable here because none of the parties has presented the Court
7 with any evidence concerning the process by which the City leased that property to the BSA-
8 DPC. Plaintiffs' claim for violation of the state constitution's No Aid Clause is **GRANTED** as
9 to the Balboa Park lease. The Cross-Motions for Summary Judgment as to Plaintiffs' claim that
10 the Fiesta Island lease violates the No Aid Clause are **DENIED**.

11 **III. Federal and California Equal Protection Clauses**

12 The Equal Protection Clause of the federal constitution's Fourteenth Amendment
13 "commands that no State shall deny to any person . . . the equal protection of the laws, which is
14 essentially a direction that all persons similarly situated should be treated alike."⁴ *City of*
15 *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Its purpose is to ensure that
16 the state does not intentionally and arbitrarily discriminate against individuals. *Personnel*
17 *Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). State action therefore
18 violates the Equal Protection Clause when it intentionally treats the plaintiff differently from
19 other persons similarly situated in all material ways. *Lee v. City of Los Angeles*, 250 F.3d 668,
20 687 (9th Cir. 2001). Here, the parties dispute whether the leases result in any disparate treatment
21 at all and, if so, whether that disparate treatment is the reason for the City's decision to lease the
22 parklands to the BSA-DPC. Specifically at issue is whether the City intended to discriminate
23 against Plaintiffs and those similarly situated, and whether there has been actual discrimination.⁵

24
25 ⁴ The same analysis applies to claims brought under California's Equal Protection Clause,
26 Cal. Const., art. I, § 7, as under the federal constitution's clause. *Bd. of Supervisors v. Local Agency*
27 *Formation Com.*, 3 Cal.4th 903, 913-24 (1992); *Griffiths v. Superior Court*, 96 Cal. App.4th 757, 775
(2002). The Court therefore analyzes the claims simultaneously.

28 ⁵ Also at issue is whether the leases alone are sufficient evidence of a relationship between
the BSA-DPC and the City so that the BSA-DPC's discriminatory actions may be fairly attributed to the
City. The parties have not addressed this argument as a distinct requirement. While the Court would

1 The Court finds that there is a dispute of material fact concerning each issue for the following
2 reasons.

3 **A. Disputed evidence of discriminatory intent**

4 Plaintiffs contend that the City has discriminated against them and those members
5 similarly situated to them because it knew that by leasing the parkland to the BSA-DPC it could
6 effectively discriminate against gays, agnostics and atheists by discriminating against the public
7 as a whole. To prevail on their unique theory, Plaintiffs must show that the record includes
8 undisputed evidence of intentional discrimination and of unequal access to the parkland. Proof
9 of discriminatory intent or motive is necessary to sustain an equal protection clause challenge.
10 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265
11 (1977); *Lee*, 250 F.3d at 687. It is not enough to show only that a law has a disparate impact on a
12 identifiable group. *Village of Arlington Heights*, 429 U.S. at 264-65 (citing *Washington v. Davis*,
13 426 U.S. 229, 242 (1876)); *Hispanic Taco Vendors of Washington v. City of Pasco*, 994 F.2d
14 676, 679 (9th Cir. 1993). When the challenged law is facially neutral, it must be shown that the
15 purpose for enacting the law was at least in part “‘because of,’ not merely ‘in spite of,’” its
16 disparate impact on an identifiable group of persons. *Feeney*, 442 U.S. at 279. That the law
17 would have inevitable or foreseeable consequences on an identifiable class of persons raises a
18 strong inference of discriminatory intent. *Id.* at 279 n. 25. That inference must, however, “ripen
19 into proof” with other evidence. *Id.* Other evidence of discriminatory intent or motive may
20 include the law’s historical background, irregularities in the laws’ passage, and the legislative or
21 administrative history. *Arlington Heights*, 429 U.S. at 266-67; *Navarro v. Block*, 72 F.3d 712,
22 716 (9th Cir. 1996).

23 Because Plaintiffs are pursuing a disparate impact theory of discrimination, the issues of
24 actual discrimination and intent to discriminate are related. The Court finds that there is a dispute
25 of material fact as to both issues. Plaintiffs’ theory is that the City Council “set in motion” a
26 series of events it reasonably should have known would result in constitutional deprivation

27 _____
28 address this in terms of whether the BSA-DPC is a state actor, it need not address it at all because the
parties’ summary judgment motions are denied on other grounds.

1 because it knew about the BSA-DPC's discriminatory membership policy and that the BSA-DPC
2 would exclude non-Scouts from the properties by making exclusive use of the leased facilities
3 from time to time.⁶ They make several points to support their contention that there is evidence in
4 the record that the City intended to discriminate against Plaintiffs and those similarly situated.
5 The Court addresses each in turn.

6 First, the Fiesta Island lease explicitly allows exclusion of the public up to 75% of the
7 time.⁷ As Defendants argue, it is true that there is no evidence that any member of the public has
8 been denied access, and that section 9.06 of the lease requires that the Youth Aquatic Facility be
9 open to all youth-serving groups and that "to give all groups an equal chance to use the Youth
10 Aquatic Facility, [the BSA-DPC] must send a letter annually to all the members of the Youth
11 Aquatic Advisory Council advising them of your operation and procedures to use the facilities."
12 *City's NOL* Ex. 2 at § 9.06(1)-(2). These facts do not controvert the fact that the lease also
13 provides that the BSA "can use/book no more than 75% of all available aquatic activities up to 7
14 days prior," thereby enabling the BSA-DPC, a discriminatory organization, to have to the facility
15 superior to that of the public. However, while this undisputed fact obviously shows that the City
16 must have intended to allow the BSA-DPC to potentially reserve a larger portion of the facilities
17 than the public, it is not undisputed evidence of the City's intentional discrimination toward
18 Plaintiffs and those similarly situated.

19 Next, Plaintiffs contend that the City's decision to construe the nondiscrimination clauses
20 prohibiting discrimination on the basis of, among other classifications, religion and sexual
21 orientation, as not applying to the BSA-DPC's membership is evidence of its intent to

22 ⁶ Plaintiffs also argue that the City knew that the BSA-DPC would enforce and comply
23 with the discriminatory membership policy from the parkland property and knew that the BSA-DPC had
24 terminated one adult leader's volunteer membership because he is gay and that it did so by mailing a
25 letter from the parkland property. These arguments are not relevant to the issue of whether Plaintiffs and
26 those similarly situated have access to the parklands equal to that of any other member of the public.
27 Plaintiffs do not challenge the BSA's constitutionally protected, discriminatory membership policy
28 applying to youth and adult members.

⁷ Plaintiffs also argue that the Court has already determined that the BSA-DPC uses the
parkland exclusively for blocks of time, citing to the Court's Order finding that Plaintiffs had standing to
bring the claims addressed in this Order. The findings that the Court made in that initial Order regarding
usage were preliminary, before the parties had completed discovery and before the record that is now
before the Court had been developed.

1 discriminate. *Id.* at § 7.04; *City's NOL Ex. 23*, FAC Ex. at § 7.04. Unlike other governmental
2 entities, the City decided not to condition its re-lease of the Balboa Park property to the BSA-
3 DPC on the organization's avowal that it would not, contrary to its current policy, discriminate
4 in membership. *See e.g., Boy Scouts of America v. Wyman*, ___ F.3d ___, 2003 WL 21545096
5 (2d. Cir. July 9, 2003); *Evans v. City of Berkeley*, 127 Cal. Rptr.2d 696 (2002)(petition for
6 review granted). On the other hand, Plaintiffs point to no evidence that the BSA-DPC has
7 discriminated against any individual in violation of this lease term. Without more, the City's
8 construal of the nondiscrimination clause does not evidence an intent. It shows only that the City
9 leased the parkland to the BSA-DPC despite its discriminatory practices.⁸ Plaintiffs must show
10 that its reason for enacting the law was at least in part "because of," not merely "in spite of," a
11 disparate impact on the Plaintiffs and those similarly situated. *Feeney*, 442 U.S. at 279.

12 Next, Plaintiffs contend that the City knew that the BSA-DPC would make exclusive use
13 of the properties from time to time, thereby barring the public, including Plaintiffs and those
14 similarly situated, from access to the parklands. As is set forth below, the extent to which the
15 BSA-DPC has exclusive or preferential use of the parkland is disputed.

16 Finally, Plaintiffs point out that the City failed to follow procedural requirements in
17 renewing the 2002 Balboa Park lease as evidence of a discriminatory intent to preclude equal
18 access to the public and therefore to gays and nonbelievers. *Id.* "[D]epartures from established
19 practices may evince discriminatory intent." *Nabozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir.
20 1996)(citing *Village of Arlington Heights*, 429 U.S. at 267). Plaintiffs contend that the City
21 Council violated the City's own policy, San Diego City Council Policy No 700-04, against
22 leasing Balboa Park property to discriminatory organizations and rejected its own Real Estate
23 Assets Department's recommendation that a 10-year lease was sufficient to amortize the DPC-
24 BSA's capital improvements and instead approved a 25 year lease with a 15 year renewal option.

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26
27 ⁸ It is this Court's opinion that the City could refuse to lease the parkland to the BSA-DPC
28 because it is discriminatory without violating the organization's First Amendment rights. That does not,
however, translate into the requirement that the City must refuse to lease the parklands or that its
decision to lease the parklands despite the BSA-DPC's discrimination is evidence of its own intent to
discriminate.

1 The City does not deny that it is leasing the Camp Balboa parkland to the BSA-DPC despite San
2 Diego City Council Policy No. 700-04.

3 Having reviewed the parties' arguments and the evidence to which they point, the Court
4 concludes that there is a sufficient dispute of material fact to preclude summary judgment in
5 favor of either party on the issue of whether the City leased the parkland with intent to
6 discriminate against Plaintiffs and those similarly situated. For the reasons set forth below, the
7 Court also finds that there is a sufficient dispute of material fact to preclude summary judgment
8 in favor of either party on the issue of whether the public and therefore the Plaintiffs and those
9 similarly situated have unequal access to the public parkland.

10 **B. Disputed evidence of discriminatory effect**

11 "[I]n order for a state action to trigger equal protection review at all, [the state] action
12 must treat similarly situated persons disparately." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th
13 Cir. 2003)(citing *City of Cleburne*, 473 U.S. at 439); *McClellan v. Crabtree*, 173 F.3d 1176, 1185
14 (9th Cir. 1999). Plaintiffs argue that they are afforded inferior access to and use of the parklands
15 in comparison to the access afforded members of the general public who, if they desire, may
16 become members of the BSA-DPC. Unlike the general public, Plaintiffs are not able to use the
17 parkland as members of the public or as members of the BSA-DPC when it is booked for "Scout
18 only" use.⁹

19 Whether and the extent to which the BSA-DPC has exclusive or preferential use of the
20 parkland is disputed. The BSA-DPC contends that it offers reservations on a first-come, first-
21 served basis and that the only reason anybody has been denied access to the parklands is because
22 of a pre-existing reservation. *Pls.' Resp. to City's SSUMF* ¶ 47. On the other hand, the record
23 does contain evidence that the Boy Scouts are able, by penciling in their own reservations in
24 advance, to effectively preclude others from using the parklands during periods of high demand.
25 *BSA-DPC's Resp. to Pls' SSUMF* ¶¶ 26, 126-128. The BSA-DPC offers contradictory

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27 ⁹ Plaintiffs also argue that they are afforded inferior access to the leased parkland because
28 the City does not construe the leases' nondiscrimination clauses as applying to BSA-DPC membership
or employment related to the parkland. The Court views this argument as a red herring since Plaintiffs
neither allege employment discrimination nor challenge the Boy Scout's right to have a discriminatory
membership policy.

1 explanations for how it takes reservations for use of the Balboa Park property, claiming both that
2 anybody can make reservations as far in advance as they wish, *BSA-DPC's Resp. to Pls.*
3 *SSUMF* ¶¶ 123, 124, but also that reservations could be made up to three months in advance and
4 would be accepted only if there was no conflict with "other scheduled Scouting functions." *Id.* ¶
5 123. The Fiesta Island lease, on the other hand, explicitly allows the BSA-DPC to "use/book"
6 up to "75% of all available aquatic activities up to 7 days prior," effectively enabling at least a
7 portion of the public to always use the facilities as long as they plan at least one week in
8 advance. *Id.* ¶ 26.

9 Neither is it clear the extent to which the BSA-DPC actually monopolizes the parklands.
10 While Plaintiffs contend that the BSA-DPC at times enjoys periods of exclusive use, *Pls.*
11 *SSUMF* ¶ 19, the BSA-DPC contends that it never uses 100% of the available space at Camp
12 Balboa or at the Aquatic Center. *BSA-DPC's Resp. to Pls.* *SSUMF* ¶ 19. While Plaintiffs state
13 that the Balboa Park campground is unavailable to the public and reserved for Cub Scout Day
14 Camp for approximately eight weeks during the summer, *Pls.* *SSUMF* ¶ 130, the BSA-DPC
15 asserts that the public may use remaining campgrounds and other facilities. *BSA-DPC Resp. to*
16 *Pls.* *SSUMF* ¶ 130. Copies from the Camp Balboa reservation book do, in fact, state that the
17 BSA-DPC has monopolized the campground for periods of time.¹⁰ Other documents confirm
18 camp closures for periods of time. *Cacciavillani Decl. Ex. 62*. The BSA-DPC does not dispute
19 that it monopolizes the campgrounds for periods of time and relies only on the fact that the
20 public may use the parkland's other facilities. *BSA-DPC's Resp. to Pls.* *SSUMF* ¶¶ 131, 132;
21 133. For example, it responds that Camp Balboa "was not in fact closed" during the summer of
22 2001 because "the Girl Scouts reserved the pool" for specified dates and, in response to the
23 remaining closures states that "Scout groups never use 100% of available space at Camp
24 Balboa." When asked how often the BSA-DPC uses the entire campground, the organization's
25 witness estimated "[probably] not half the time." *Cacciavillani Decl. Ex. 37*, *Kienke Dep. 63:24-*
26

27 ¹⁰ The BSA-DPC reserved the entire campground from July 2 through August 17, 2001 for
28 its Summer Day Camp; from February 23-25, 2001 for Spring Encampment; from March 23,-25 for an
unspecified reason; again from May 25-27, 2001; and again December 31, 2001-January 5, 2002. *Pls.*
SSUMF ¶ 131, *Pls.* *NOL Exs. C, D*.

1 644. He explained that “scouting groups come in and maybe do something like a camparee, and
2 they would – they would possibly request all – the whole area.” *Id.* at 64:24-65:3. Camparees
3 usually last from a Friday night until Sunday. *Id.* at 65:9-10; *Plfs.’ SSUMF* ¶ 134. Kienke further
4 testified that while non-scouting groups can reserve a campsite during a day-camp period at
5 Camp Balboa, that he was not aware of any such instance. *Id.* 170:13-23.

6 Neither does the BSA-DPC disagree that the Fiesta Island facility is unavailable to the
7 public for six weeks during the summer when the Scouts conduct a summer camp program, four
8 weeks of which are reserved exclusively for the Boy Scouts. *Pls.’ SSUMF* ¶¶ 138-140. Rather,
9 the BSA-DPC again states that groups are still able to use certain parts of the facility, here
10 stating that groups regularly reserve the dormitories and that two weeks of Sea Camp is open to
11 non-Scout youth groups. *BSA-DPC’s Resp. to Pls.’ SSUMF* ¶¶ 139, 142.

12 Both sides have offered statistics quantifying actual BSA-DPC usage in comparison to
13 public usage. Plaintiffs rely on documents prepared by the BSA-DPC before litigation was
14 initiated and measure usage in terms of the number of individual Scouts versus number of
15 individuals from the public. Defendants rely on a statistical study done for the purposes of
16 litigation and measure usage in terms of “available days.” The Youth Aquatic Center’s 2001
17 Quarterly Reports show that the BSA-DPC made up almost two-thirds of users of that facility.
18 Another one-fourth of the users came with another youth organization called Sea Camp, and the
19 general public made up the remainder, about 10%. *Plfs.’ SSUMF* ¶ 143. At the December 4,
20 2001 City Council hearing, counsel for the BSA-DPC, measuring usage in terms of users, stated
21 that “one in five guests at Camp Balboa are [sic] not members of the Boy Scouts.” *Cacciavillani*
22 *Decl. Ex. 16; Amended Transc. of San Diego City Council Hearing of Dec. 4th, 2001* at 35:5-6.
23 Here, the BSA-DPC, using the concept of “available days,” contends that

24 Overall, non-Scout groups are the primary users of the Aquatic Center. In the first
25 three quarters of 2002, on 66% of the available days a non-Scout group used some
26 function room or aquatic equipment at the Aquatic Center, and on 28% of
27 available days a Scout group used some such room or equipment. In 2001, on 47%
28 of available days a non-Scout group used some function room or aquatic
equipment at the Aquatic Center, and on 30% of available days a Scout group used
some such room or equipment. In 2000, on 26% of available days a non-Scout
group used some function room or aquatic equipment at the San Diego Youth
Aquatic Center, and on 29% of available days a Scout group used some such room
or equipment.

1 BSA-DPC's Resp. to Pls.' SSUMF ¶ 143.

2 The Court cannot conclude based on the record before it that the public, and therefore the
3 Plaintiffs and those similarly situated, have unequal access to the public parkland. Not only are
4 Plaintiffs pursuing a novel theory of discrimination, the issues of whether the public itself has
5 been afforded unequal use of the parkland and whether the City leased the parkland to the BSA-
6 DPC at least in part for the purpose of affording unequal access are disputed. The parties' Cross-
7 Motions for Summary Judgment are therefore **DENIED**.

8 **IV. State common law claim**

9 Plaintiffs contend that the leases are in violation of state common law requiring that
10 public parkland not be diverted from public use because the leases allow the BSA-DPC to use
11 significant portions of the parkland for its private, administrative purposes, including the
12 enforcement of its discriminatory membership policy, and because the leases enable the BSA-
13 DPC, a private and discriminatory organization, to have preferential use of the parkland. To
14 support its claim, Plaintiff relies on a line of cases exemplified by *San Vicente Nursery School v.*
15 *County of Los Angeles*, 147 Cal. App.2d 79 (1956), in which the California Court of Appeal
16 found that a private school's exclusive use of a building in a public park was an unlawful
17 diversion of public park property because it was to the unreasonable exclusion of members of
18 the public and benefitted only the limited number of children attending the school. *See id.* at 86.
19 *See also Slavich v. Hamilton*, 201 Cal. 299 (1927).

20 On the record before the Court Plaintiffs' argument would have great appeal were it not
21 for the fact that the City of San Diego is a charter city with plenary power in municipal affairs
22 subject only to federal and state constitutional law and the charter itself. Cal. Const., art. XI, sec.
23 5; *Ainsworth v. Bryant*, 34 Cal.2d 465, 469 (1949). With regard to its municipal affairs, the City
24 is not subject to the state common law on which Plaintiffs rely. "[T]he city has all powers over
25 municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations
26 and restrictions contained in the charter. . . . Thus in respect to municipal affairs the city is not
27 subject to general law except as the charter may provide." *City of Grass Valley v. Walkinshaw*,
28 34 Cal.2d 595, 598-99 (1949). "The power of a charter city over exclusively municipal affairs is

1 all embracing, restricted and limited only by the city's charter, and free from any interference by
2 the state through the general laws." *Simons v. City of Los Angeles*, 63 Cal. App.3d 455, 468
3 (1976).

4 While the task of determining whether a particular activity is a "municipal affair" is
5 typically an ad hoc inquiry, *City of Long Beach v. Dep't of Industrial Relations*, ___ Cal. Rptr.3d
6 ___, 2003 WL 21641013, at *5 (Cal. Ct. App. July 14, 2003), it is well established that "park
7 regulation is a municipal affair." *Id.* at 467. "A charter city has inherent authority to control,
8 govern and supervise its own parks. The disposition and use of park lands is a municipal affair."
9 *Id.* at 468 (internal quotations omitted). *See also City of Marysville v. Boyd*, 181 Cal. App.2d
10 755, 757 (1960) (holding that charter city had authority to deed public parkland to the county for
11 the purpose of erecting a courthouse in part because city's charter was silent on issue); *Wiley v.*
12 *City of Berkeley*, 136 Cal. App.2d 10, 15 (1955).

13 Plaintiffs argue that this case is materially distinct from the cases to which Defendants
14 cite because the latter deal with conflicts between state legislation and city charters, whereas
15 here the conflict is between the city charter and state common law. Plaintiffs do not explain how
16 the distinction is material and the argument ignores the sweeping grant of authority provided to
17 charter cities. Plaintiffs also contend that their claim "does not deal with how the City operates
18 or regulates Mission Bay Park or Balboa Park," but with "the ability of all citizens to access
19 public parkland in the first instance." *Pls.' Reply to City's Opp. Br.* at 8. Defendants do not
20 dispute that the City is subject to federal and state constitutional law, and Plaintiffs' claims
21 attacking the leases as being in violation of federal and state constitutional law are discussed
22 above. The argument is an attempt to bootstrap this state common law claim into a constitutional
23 law claim. Plaintiffs' constitutional law claims are considered separately. Finally, Plaintiffs
24 contend for the first time in their opposition brief that the leases violate section 55 of the City
25 Charter itself, which rededicates Balboa Park thereby affirming the city and state dedications
26 that the lands be held in trust forever for public use. *Pls.' Opp. to City's Mot. for Summ. J.* at 26.
27 A party may not defeat summary judgment by asserting new legal theories in an opposition brief.
28 *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1293 (9th Cir. 2000). As a charter city, the

1 City of San Diego is not subject to common law in the leasing of the parklands at issue here.
2 Defendants' Cross-Motions for Summary Judgment on Plaintiffs' state common law claim are
3 **GRANTED.**

4 **V. The BSA-DPC's First Amendment right to free expression**

5 The BSA-DPC's right to hold and express its private views is not in issue here. Plaintiffs
6 do not challenge the BSA-DPC's right as an expressive organization to discriminate in its
7 membership against gays and nonbelievers. Rather, Plaintiffs challenge the parkland leases as
8 the City's unconstitutional endorsement of the BSA-DPC as a religious organization and as the
9 means to discriminate against gays and nonbelievers. Nonetheless, Defendants argue that
10 rescission of the leases would be unconstitutional viewpoint discrimination. Defendants contend
11 that the BSA-DPC not only has the right to discriminate privately against gays and nonbelievers,
12 but that it also has the right to do so while leasing the parkland property. Contrary to
13 Defendants' argument, the BSA-DPC's status as an expressive organization does not entitle it to
14 governmental aid, especially on terms more favorable than those held by other,
15 nondiscriminatory, organizations.

16 Defendants argue that the BSA-DPC is the beneficiary of a leasing program analogous to
17 the programs in a line of cases exemplified by *Rosenberger v. Rector and Visitors of the*
18 *University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, the University of Virginia created a
19 campus program whereby student groups submitted bills for student activities related to
20 educational purposes from outside contractors for payment by the fund, which received its
21 money from mandatory student fees. The plaintiff filed suit after the University denied his
22 Christian student newspaper's application for payment of printing costs on the ground that
23 publication of the newspaper was a "religious activity" because it "promoted or manifested a
24 particular belief in or about a deity or an ultimate reality." *Id.* at 827. The Supreme Court held
25 in part that the University's denial of funding was unconstitutional viewpoint discrimination in a
26 designated public forum and because "[t]here is no Establishment Clause violation in the
27 University's honoring its duties under the Free Speech Clause," since the aid program was
28 neutral toward religion. *Id.* at 840, 846.

1 Here, the leases are not the result of a "program," let alone a program neutral toward
2 religion, and there is no nexus between the purpose of the leases and the protected expression.
3 As is set forth above, the City selected the BSA-DPC for preferential treatment. The leases are
4 therefore not part of a designated public forum, but are instead a nonpublic forum in which the
5 City selected its recipient by making the value judgment that the BSA-DPC alone is best suited
6 to fulfill the City's needs with respect to the parkland. *See Transc., March 10, 2003, Hrg. on*
7 *Cross-Mot. for Summ. J.* at 20:18-21:12. Whether the BSA-DPC is the lessee of the parkland has
8 absolutely no impact on or connection to the BSA-DPC's ability to maintain its discriminatory
9 membership policy.

10 The Court accordingly rejects Defendants' argument that rescission of the leases would
11 amount to unlawful viewpoint discrimination. The government does not automatically engage in
12 unconstitutional viewpoint discrimination when it determines, as it did here, whether to award a
13 government subsidy by making a value judgment about the recipient's suitability for the subsidy.
14 *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). Finally, Defendants'
15 argument would fail even if the City decided not to lease the parkland to the BSA-DPC because
16 of its discriminatory membership policy. The government's decision to exclude organizations
17 with discriminatory membership policies is viewpoint neutral when the purpose for the decision
18 is to protect persons from the effects of discrimination and not to exact a price for the
19 organization's protected expression. *Wyman*, ___ F.3d ___, 2003 WL 21545096 at *10 (holding
20 that the state's decision to bar the Boy Scouts from a state workplace charitable campaign
21 because it is a discriminatory organization did not violate the organization's First Amendment
22 rights as an expressive association). *See also Cornelius v. NAACP Legal Defense & Educational*
23 *Fund, Inc.*, 473 U.S. 788 (1985). Defendants argument that rescission of the leases would
24 violate the organization's First Amendment right to expression is therefore rejected.

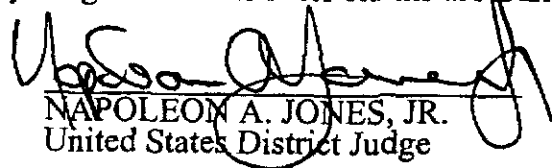
25 *Conclusion*

26 Having read the parties' briefs, supporting documents and evidence, and the applicable
27 law, and given full consideration to the arguments made by all parties and admissible evidence
28 in support thereof, **IT IS HEREBY ORDERED** that:

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- (1) Plaintiffs' Cross-Motion for Summary Judgment on their claims that the Balboa Park lease violates the Establishment Clause of the federal constitution and the No Aid and No Preference Clauses of the state constitution is **GRANTED**;
- (2) The BSA-DPC and City's Cross-Motions for Summary Judgment on Plaintiff's claim that the parkland leases violate state common law are **GRANTED**;
- (3) The Cross-Motions for Summary Judgment on all other claims are **DENIED**.

Dated July 30, 2003


NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Battaglia
All Counsel of Record