

No. 03-56517

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Appellees.

On Appeal From the United States District Court
for the Southern District of California, No. 00-CV-1726

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America state that they are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils approximately 300 not-for-profit corporations such as Desert Pacific Council to support Boy Scouting and other Scouting programs in localities nationwide.

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REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure, Appellants respectfully request that this Court hear oral argument. This case presents for review a decision of a district court that singles out Boy Scouts based on viewpoint in violation of their constitutional rights. Appellants believe that oral argument will assist the Court in addressing the issues presented.

JURISDICTIONAL STATEMENT

The City of San Diego leases portions of Balboa Park to local affiliates of the nation's three major youth camping organizations—Boy Scouts, Girl Scouts, and Camp Fire Boys and Girls—as well as to numerous other non-profit community organizations. The youth camping leases require that the leased facilities be made available for use by the general public.

In the case of the parcel leased by the Boy Scouts, known as Camp Balboa, over 30 per cent of the usage is by individuals or groups unaffiliated with the Boy Scouts. While Plaintiffs-Appellees (“Plaintiffs”) have never sought to use Camp Balboa and would be welcomed if they did, Plaintiffs sued to enjoin the City from continuing the lease because Plaintiffs do not like Boy Scouts’ internal membership policies with respect to religion and sexual orientation.

Plaintiffs sued both Desert Pacific Council, Boy Scouts of America and Boy Scouts of America (together “Boy Scouts”) and the City of San Diego alleging that their civil rights were violated because two City leases with Boy Scouts violate the Establishment Clause and parallel California provisions, the Equal Protection Clause and parallel California provisions, and California common law.

The Honorable Napoleon A. Jones, Jr. of the United States District Court for the Southern District of California granted Plaintiffs’ motion for

summary judgment on the count seeking a permanent injunction against the City's lease of Camp Balboa to Boy Scouts on the basis of the Establishment Clause and parallel California provisions. See Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (attached). Claims relating to another lease, for a half acre on Fiesta Island maintained as an Aquatic Center for youth groups in San Diego, remain for trial. Boy Scouts timely filed their Notice of Appeal on August 22, 2003.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to hear an immediate appeal from the Order granting summary judgment on the permanent injunction count on Camp Balboa.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that rescinding the City's lease to Boy Scouts, solely on account of Boy Scouts' constitutionally protected viewpoints and internal membership policies, does not constitute viewpoint discrimination in violation of the First Amendment.
2. Whether the district court erred in concluding that the City violated the Establishment Clause of the United States Constitution and the parallel provision of the California Constitution by leasing Camp Balboa to Boy Scouts.

STATEMENT OF THE CASE

Nature of the Appeal

This appeal concerns one of the City of San Diego’s many leases to nonprofit organizations. Pursuant to City Council Policies, the City leases parkland property suitable for camping to nonprofit youth organizations, including Girl Scouts, Boy Scouts and Camp Fire, and leases other City parkland as well as residential and commercial property to over 100 nonprofit organizations—most for little or no cash rent. (ER 65-70, 90-92.) In return, the City requires that the nonprofits maintain and improve the properties and operate community services on the properties at the sole expense of the nonprofits. (See, e.g., ER 58-59, 61-62, 93-101.)¹

The City leases to a wide variety of community organizations—including San Diego Calvary Korean Church, Salvation Army, Black Police Officers Association, Jewish Community Center, Vietnamese Federation of San Diego—without regard to their religious or moral viewpoints, or their internal membership requirements. (See ER 90-92.) Many of the leases were the product of exclusive negotiations with the City, since particular groups have been deemed by the City to be particularly appropriate operators of particular pieces of property

¹ “ER _____” refers to the “Excerpts of Record.”

and since exclusive negotiations may enable the City to obtain the best lease terms for the City. See 275 F. Supp. 2d at 1274-75; (ER 813, 1010-11, 1064.) Without nonprofit lessees to operate these properties on their own, the City would bear the burden of maintenance itself. For example, the City spends around \$1.5 million annually to maintain the portions of Balboa Park that it does not lease to other operators. (ER 135.) The leasing program, therefore, saves the City money.

The City leased a site in Balboa Park to the local Boy Scout council, Desert Pacific Council, to build, maintain, and operate a campground for use by youth groups and the San Diego community. Were it not for the City's leases to Desert Pacific Council, there would be no Camp Balboa for the community to use. Desert Pacific Council is obligated to spend \$1.7 million of its charitable assets over the next seven years on improvements to the campground at Camp Balboa and spends approximately \$148,000 annually to maintain both Camp Balboa and the Aquatic Center. Desert Pacific Council is performing a valuable community service at no cost to the City during the terms of the leases; when the leases expire, all buildings constructed by Desert Pacific Council on the sites will revert to the City.

The facilities are available to the public entirely on a first-come, first-served basis. There is no evidence that anyone has been or would be denied access to the facilities on the basis of religion or sexual orientation. Plaintiffs have never

sought to use the facilities at either site. Yet, because Plaintiffs philosophically oppose Boy Scouts' internal membership policies from afar, they have attempted to allege a civil rights claim and invalidate the City's leases. If Plaintiffs were to succeed, however, it is Boy Scouts whose civil rights would be violated.

Course of Proceedings

Plaintiffs filed this civil action on August 28, 2000, two months after the United States Supreme Court held in Boy Scouts of America v. Dale, 530 U.S. 640 (2000), that Boy Scouts' membership requirements were constitutionally protected and could not be interfered with by state law.

On April 13, 2001, the court below denied the motions of Boy Scouts and the City for summary judgment based on Plaintiffs' lack of standing. The district court noted that although Plaintiffs never tried to use the properties in question, they still might have standing as municipal taxpayers, depending on discovery. The district court concluded that "there is an issue of fact as to the fair market value of the properties in question, the effect on the fair market value of the Boy Scouts' improvements, and the cost of maintaining the properties." (ER 13-14.)

Plaintiffs' First Amended Complaint alleges that the leases violated the Establishment Clauses of the United States and California Constitutions, the "No Preference" Clause of the California Constitution, the Equal Protection Clauses of the United States and California Constitutions, the "No Aid" Clause of

the California Constitution, and California common law. Plaintiffs requested that the district court “declare that defendants’ leases of public parkland in Balboa Park” violate federal and state law and “issue a permanent injunction” prohibiting the City “from continuing to lease” Camp Balboa to Desert Pacific Council. (ER 39.)

On January 31, 2003, all parties moved for summary judgment on all counts.

Opinion Below

On July 31, 2003, the district court denied Boy Scouts’ motion for summary judgment on its viewpoint discrimination defense and granted Plaintiffs’ motion for summary judgment on the claim that the Balboa Park lease violates the Establishment Clause of the United States Constitution and the Establishment, No Aid, and No Preference Clauses of the California Constitution.

The Order begins by describing Boy Scouts’ observance of the Scout Oath and Law as Boy Scouts’ “anti-homosexual, anti-agnostic and anti-atheist stance” and stating that “lawsuits like this one are the predictable fallout from the Boy Scouts’ victory before the Supreme Court” in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). 275 F. Supp. 2d at 1263. Throughout the Order, the district court refers to Boy Scouts having “discriminatory beliefs” and “discriminatory membership polic[ies],” and repeatedly calls Boy Scouts a “discriminatory

organization.” Id. at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288.² The district court invalidated the City’s lease to Boy Scouts in the name of “values requiring tolerance and inclusion in the public realm.” Id. at 1263.

In its Establishment Clause analysis, the district court acknowledged the applicability of the “reasonable observer” test to determine whether the leases have the “primary effect of advancing religion,” or were “allocated on the basis of neutral, secular criteria.” Id. at 1266, 1267.

The court acknowledged that the City produced evidence of City leases of “publicly-owned land to ‘well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City’ without regard to whether the lessees are religious.” Id. at 1274 (quoting City’s Resp. Br. at 7 and citing Rothans Decl. ¶ 19 (ER 69-70, 90-92)). The court also noted the City Council Policies for leasing property to nonprofits in Balboa Park. Id. at 1283.

² It was highly inappropriate for a District Judge to so characterize lawful and constitutionally protected policies, policies reflective of traditional moral values held by millions of law-abiding citizens. Labeling of Boy Scouts as “discriminatory” amounts to no more than name-calling. Boy Scouts’ membership decisions are as lawful and constitutionally protected as those of any of the other lessees of City property—as lawful and protected as the Girl Scouts limiting their services to girls and the Black Police Officers Association limiting its services to black officers. The Salvation Army is a Christian organization that considers homosexual conduct to be immoral. And while anyone can sign-up for the Jewish Community Center because it is open to the public, membership in Judaism is not similarly open.

Furthermore, the district court reviewed in detail “the process by which the City determines to whom it will lease its public lands.” Id. at 1274. The City’s Real Estate Assets department gets directions from the Mayor and City Council as to “what they would like us to do with the property” and recommendations as to “whether to enter into exclusive negotiations with a particular organization.” Id. Real Estate Assets then decides whether to “either solicit interest in the property by doing a request for proposal (‘RFP’) that includes selection criteria or, recommend an exclusive negotiation with a particular prospective lessee.” Id.

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

Id. Finally, “the Mayor and the City Council decide whether to approve a lease based on information provided them by Real Estate Assets.” Id. at 1275.

In the case of the Camp Balboa lease, Real Estate Assets’ negotiations with Desert Pacific Council “did not prevent any other organization from submitting a bid” and offering “a better deal.” Id. at 1275. The City Council approved the lease only after “extensive public hearing,” and the negotiations did not “preclude the fact of opportunity for some other group to come in and say, ‘we

could do better,’ and no one did.” Id. The district court concluded that “the City selected its recipient by making the value judgment that the [local Scout council] alone is best suited to fulfill the City’s needs with respect to the parkland.” Id. at 1287.

After examining the undisputed evidence of the “history and context of the community and forum,” the court excluded that evidence as irrelevant. 275 F. Supp. 2d at 1274; see id. at 1287 (“the leases are not the result of a ‘program’”). After reviewing the undisputed fact that the City commonly negotiates exclusively with potential lessees, see id. at 1274-75 (citing Griffith Dep. at 92-94) , the district court concluded that “the City does have an established process by which City properties are put up for lease, but which was not used in the 2002 [sic] lease of the Balboa Park property to the [Scouts].” Id. at 1274.³

³ The number of instances in which the City negotiated exclusively was never a basis of Plaintiffs’ claims. Plaintiffs alleged that the City was not permitted to lease to Boy Scouts no matter what the process. The Court may take judicial notice of City Council’s minutes showing that the City has engaged in exclusive lease negotiations with numerous groups. See City Council Minutes: Jan. 28, 2002 at 25-26 (YWCA); Nov. 20, 2000 at 69-70 (Hillel of San Diego); Sept. 18, 2000 at 25-26 (Air Adventures Skydiving, Inc.); Oct. 18, 1999 at 25-27 (Orfila Vineyards); May 4, 1999 at 23-24 (Black Police Officers Association); Feb. 2, 1998 at 20-22 (Presidio Hills Golf Course); Sept. 9, 1996 at 56 (Black Police Officers Association); Mar. 4, 1996 at 32-33 (Neighborhood House Association); Oct. 16, 1995 at 16-18 (“Young Men’s Christian Association of San Diego County”); Oct. 2, 1995 at 9-10 (Mission Bay Sailing Center); July

(Footnote continued on next page)

The district court held that, because Boy Scouts require that members and leaders do their “duty to God,” as required by the Scout Oath, and be “reverent,” as required by the Scout Law, the City violated the Establishment Clause and California law in negotiating exclusively with Boy Scouts. *Id.* at 1276. “The burden . . . was on the City to take affirmative steps to avoid an Establishment Clause violation by making the lease available to the religious, areligious and irreligious on a neutral basis.” *Id.* at 1275.

STATEMENT OF FACTS

The Parties

Plaintiffs

Plaintiffs are an atheist couple and their minor child, and a lesbian couple and their minor child, who have never sought to use Camp Balboa. Apr. 13, 2001 Order at 8 (ER 8). (ER 367, 374, 376-77, 384.) The undisputed evidence is that Camp Balboa is open to and used by members of the general public and that

(Footnote continued from previous page)

13, 1992 at 25-26 (Sherman Heights Community Center); Oct. 26, 1987 at Item 112B (Sherman Heights Community Center); June 29, 1987 at 13-14 (Sherman Heights Community Center); Feb. 17, 1987 at Item 150 (San Diego Hebrew Day School). The San Diego City Council minutes are available at <http://clerkdoc.sannet.gov/Website/council-mins>. See Fed. R. Evid. 201(b) (2003); *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1064 n.7 (9th Cir. 1998) (public records are properly the subject of judicial notice).

Plaintiffs would be permitted to use it on the same basis as any other member of the general public. (See ER 413-14, 447-48.)

City of San Diego

The City of San Diego (the “City”) has a long history of “encourag[ing] nonprofit organizations to develop cultural, educational, and recreational programs” on City property. (ER 99; see ER 93-98.)

Boy Scouts

Boy Scouts of America is a nonprofit youth camping organization whose youth members and adult leaders subscribe to the Scout Oath and Law. The Scout Oath is as follows:

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

The Scout Law provides that a Scout is

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

(ER 1088.)

Although Boy Scouts include boys of virtually every religious denomination and are wholly nonsectarian, membership is limited to those who

promise to “do their duty to God” and to be “reverent.” Accordingly, avowed atheists and agnostics are not eligible for membership. Similarly, since Boy Scouts believe that homosexual conduct is not “morally straight,” avowed homosexuals are not eligible for leadership. Apr. 13, 2001 Order at 2 (ER 2). Boy Scouts of America charters Desert Pacific Council to support the 18,576 youth members and 8,236 adult volunteers participating in the traditional programs of Cub Scouts, Boy Scouts, and Venturing in San Diego and Imperial Counties. (ER 277.)

Desert Pacific Council also supports an additional 4,331 youth and their 324 leaders who participate in Learning for Life programs, a separate affiliate of Boy Scouts of America without any membership requirements. (*Id.*) Learning for Life provides programs to assist schools and youth-serving organizations in preparing youth to develop character and formulate positive values.⁴

The City’s Nonprofit Leasing Program Promotes Public Policy

Pursuant to City Council Policies, the City leases property to a wide variety of nonprofit organizations for little or no cash rent in order that they maintain, and improve the property, and operate community services at their own expense. (Policy No. 700-04 (ER 99-101); Policy No. 700-08 (ER 93-98).) The City leases dedicated parkland to various nonprofits which provide “recreational,

⁴ See <http://www.learning-for-life.org>.

cultural, or educational service to a broad segment of the citizens of San Diego.”

(ER 99.)

Balboa Park Leases Serve San Diego

Under the City of San Diego’s Charter, Balboa Park is dedicated parkland. (ER 56-57, 399-400, 402-03.) Dedicated parkland may be used only for park, recreation, or cemetery purposes unless two-thirds of the City’s electorate vote otherwise.⁵ (ER 102-03.) “As the City has grown, greater emphasis has been placed on cultural and recreational activities. The role of Balboa Park as the cultural and recreational center of the city has thus become more important to the city.” (ER 548.) Among the “major goals” at the “foundation” of the Balboa Park Master Plan is to “[p]reserve and enhance the mix of cultural, and active and passive recreational uses within Balboa Park that serve national, regional, community and neighborhood populations” and “[p]reserve Balboa Park as an affordable park experience for all citizens of San Diego.” (ER 552.)

⁵ “All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.” City Charter, art. V, § 55. (ER 102-03.)

The Balboa Park Master Plan reserves “Zone 1” in the northwest corner as the area for the Girl Scouts, Camp Fire, and Boy Scouts to maintain campgrounds for the purpose of providing,

an area for the appreciation of nature and the opportunity for young person social interaction within an outdoor setting. Although not a campground within the “wilds” so to speak, the camps provide a natural enough character to act as a transitional experience between the “city” and the “country.”

(ER 554.) Boy Scouts are able to provide meeting space and youth recreation facilities that are inexpensive and available for use by other youth organizations and the general public, when many smaller youth organizations and youth organizations less strongly focused on camping and the out of doors would not be able to do the same. (E.g., ER 357.)

Like Girl Scouts and Camp Fire Boys and Girls, Desert Pacific Council has leased Balboa Park property for many years. (ER 322-23.) Under the lease, which covers approximately 15.61 acres of Balboa Park, Desert Pacific Council has improved the Camp Balboa property by (1) constructing nine campsites, a swimming pool, an amphitheater, a program lodge, a picnic area, a parking lot, restrooms and showers, storage facilities, a ham radio room, a residence and office for a camp ranger; (2) landscaping and planting trees—even off site along the roadway; and (3) bringing water and power to the property. (Id.; ER 280.) Desert Pacific Council is in the process of building a climbing wall.

(ER 280.) Nearing the end of 50-year leases, Boy Scouts and Girl Scouts in recent years requested renewals to serve as the basis of capital campaigns to further improve the leased premises. (ER 322-23.)

The City Council considered and approved the Boy Scouts' and Girl Scouts' leases at the same meeting. (ER 256-57, 322-23, 563-68.) As a result, in December 2001, the City approved a 25-year lease agreement to Desert Pacific Council at the initial rental rate of \$1 per year and added a \$2,500 annual administrative fee, which more than covers any expense to the City of administering the lease. (ER 322-23; see ER 283-321.) Under the new lease, Desert Pacific Council also must:

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

(ER 288-89, 291, 300-05, 308-09.) Desert Pacific Council spends about \$148,000 per year maintaining Camp Balboa and the Aquatic Center. (ER 267-68, 278.)

Desert Pacific Council makes both properties available for use by Scouts and by the public alike on a first-come, first-served basis. (ER 279-80, 411, 427, 439, 449.) Camp Balboa is used substantially by non-Scout groups (34% in 2002) (ER 281), and is never exclusively used by Scouts (ER 279-81). Numerous community organizations have used Camp Balboa for their own programs, including: Camp Reach for the Sky, Junior Athletes in Wheelchair Sports (“JAWS”), Boys and Girls Clubs, YMCA, Red Cross, Girl Scouts, Grossmont Hospice, Drug Education for Youth, Camp Fire Boys and Girls, church groups, San Diego regional prosecutors, and school and civic groups. (ER 260, 261, 281, 352-56, 357, 412, 418, 419, 429, 436.) For “at least the past 18 years” the American Cancer Society has conducted Camp Reach for the Sky, a day camp for children ages four through 10 who are in treatment for or are survivors of cancer, at Camp Balboa each summer. (ER 357.)

Since 1955, Girl Scouts of San Diego-Imperial Council, Inc., has leased approximately 15 acres of Balboa Park for a youth recreational facility and related administrative offices. (ER 87-89, 215, 218-255.) Under that lease, Girl Scouts built improvements to the property, including administrative headquarters, a resource center, a Scout store, and cabins. (ER 256.) In December 2001, the City

approved a 50-year lease agreement at the initial rental rate of \$1 per year and added a \$2,500 annual administrative fee. (ER 256, 291-92.) Under the new lease, Girl Scouts also must raise and expend at least \$1.9 million during the first seven years of the lease to improve the leased premises, including constructing a multipurpose building, amphitheater, storeroom, and expanded recreational areas. (ER 256.)

In 1957, Camp Fire Boys and Girls entered into a 50-year lease of part of the northwest corner of Balboa Park for a youth recreational facility and related administrative offices. (ER 119-26.) The City lease agreement provided for a rental rate of \$1 per year. (Id.) Under that lease, Camp Fire was required to devise a Master Plan for development of the property and begin construction within the first five years of the lease. (Id.)

The City likewise leases property to numerous other youth groups for little or no cash rent:

- Boys & Girls Clubs
- La Jolla Youth
- Jewish Community Center
- Mission Valley YMCA
- San Carlos Little and Senior League
- Boys Club
- Torrey Hills YMCA
- Mira Mesa West Little League
- Rancho Family YMCA
- Presidio Little League
- Girls Club
- Peninsula YMCA
- Chollas Lake Little League
- Sunshine Little League
- Pro Kids Golf Academy

- Barrio Station
- Copley YMCA
- Firehouse YMCA
- La Jolla YMCA

(ER 90-92.) All but six of the groups listed above have lease terms of between 25 and 65 years. (Id.) All but six of the leases are of City parkland.

In addition to these youth groups, many other nonprofit organizations lease City parkland in Balboa Park for little or no cash rent on similar lease terms:

- San Diego Natural History Museum
- San Diego Historical Society Museum
- San Diego Art Institute
- Reuben H. Fleet Science Center
- San Diego Civic Light Opera
- San Diego Aerospace Museum
- Old Globe Theater
- Museum of Man
- Committee of 100
- San Diego Museum of Art
- San Diego Model Railroad Museum
- United Nations Association
- Museum of Photographic Arts
- Balboa Art Conservation Center
- Japanese Friendship Garden
- Veterans Memorial Center
- San Diego Automotive Museum
- Mingei International Museum
- San Diego Zoo
- Hall of Champions

(ER 69, 90-92.) All but three of these leases have terms between 25 and 55 years.

(Id.)

Other community organizations lease City property which is residential or commercial—and higher in market value—for little or no cash rent:

- San Diego Homeless Coalition
- San Diego Calvary Korean Church
- Elderhelp of San Diego

- Black Police Officers Association
- Vietnamese Federation of San Diego
- San Diego County Jobs for Progress
- Salvation Army
- Alpha of San Diego
- Pro-Tech Inc.
- Point Loma Community Presbyterian Church
- San Diegans United for Safe Neighborhoods
- San Diego Youth and Community Services
- Alzheimer's Family Center
- Logan Heights Family Health Center
- San Diego Tennis Patrons
- Mid-City Community Clinic
- Accion San Diego
- Neighborhood House Association
- Ocean Beach Child Care Project
- Gaslamp Quarter Historical Foundation
- Conservation Biology Institute

(ER 90-92.) Most of these leases have terms between 10 and 50 years; more than one-third are for 20 years or more. (Id.)

The City leases all of this property without regard to the religious or moral viewpoints of the lessees. Girl Scouts sell Religious Emblems materials in their shop in Balboa Park. (ER 731.) The Jewish Community Center holds Sabbath and Hanukkah celebrations and maintains a Judaica Library on its parkland property. (ER 150, 576-93, 651.) San Diego Calvary Korean Church requires members to “accept the principles of the Presbyterian faith [and] be baptized.” (ER 177.) The Salvation Army and the Point Loma Community Presbyterian Church require a belief in Jesus Christ (ER 144, 594), and the Salvation Army has moral reservations with respect to homosexual conduct as do Boy Scouts.

The Lease to Boy Scouts Advances City Policy

There is no dispute that by leasing to Desert Pacific Council the City is motivated only by providing recreational facilities to young people. Plaintiffs admit that, according to the City, the “leases of public parkland to [Desert Pacific Council] benefit the youth of San Diego and the community as a whole by providing recreational facilities for young people” (Pls.’ Mem. at 27), and that “the City determined that leasing parkland to [Desert Pacific Council] advances the public policy of San Diego and is the best use for the properties in question” (id. at 2). Furthermore, Plaintiffs admit that the City’s motivations were purely secular. (Id. at 14 (“here, the government offers a secular rationale”).)

There is no dispute that the leased property, as dedicated parkland, has no meaningful market value. (ER 59, 63, 263, 266-67, 401, 803, 805-06, 807-08, 880.) Balboa Park is “permanently” dedicated parkland (ER 39 ¶ 98) and must be valued as such. In any event, it is undisputed that Desert Pacific Council puts more money into Camp Balboa than Plaintiffs’ experts say the underlying properties are worth for recreational purposes. (ER 624 ¶ 42; see ER 671 ¶ 42.) Plaintiffs value Camp Balboa at \$1.25 to \$1.9 million to purchase outright for recreational purposes (ER 624 ¶ 42) and it is undisputed that the current lease alone calls for \$1.7 million in improvements plus annual maintenance expenditures. (ER 306.)

Plaintiffs Suffered No Injury

There is no evidence that Plaintiffs or anyone else have ever been denied use of Camp Balboa on any discriminatory basis. Plaintiffs have never been to the property or inquired about using it. Apr. 13, 2001 Order at 8 (ER 8). (ER 367, 374, 376-77, 384.) When gay and lesbian parents and their children have inquired, Desert Pacific Council has encouraged them to use Camp Balboa and the San Diego Youth Aquatic Center. (ER 413-14, 447-48; see ER 63.) Atheist and agnostic parents and children are likewise welcome. (ER 414; see ER 63.) There is nothing preventing Plaintiffs from enjoying Camp Balboa.

The City has not spent any of Plaintiffs' tax dollars with respect to the Boy Scouts' lease of Camp Balboa. (ER 60 (“the City spends nothing to maintain the facilities at Camp Balboa”).) In contrast, the City spends a great deal to maintain the City parkland it does not lease. The City spends approximately \$1.5 million annually to maintain other parkland property in Balboa Park and almost \$15,000 per building per year to maintain 115 Balboa Park buildings. (ER 135.)

SUMMARY OF ARGUMENT

The United States Supreme Court has held that Boy Scouts' membership requirements are protected by the First Amendment, Boy Scouts of America v. Dale, 530 U.S. 640 (2000), and the California Supreme Court has held

that Boy Scouts' membership requirements do not violate State law, Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998); Curran v. Mount Diablo Council of Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998). The City has never concluded that Boy Scouts violated any City policy or the lease agreements. Indeed, the City's decision to lease to the local Scout council represented the City's "judgment" that it is "best suited to fulfill the City's needs with respect to the parkland." Barnes-Wallace, 275 F. Supp. 2d at 1287.

In spite of Boy Scouts' engaging in perfectly lawful activity, the district court labeled Boy Scouts' adherence to the Scout Oath and Law "an anti-homosexual, anti-agnostic and anti-atheist stance," id. at 1263, and repeatedly branded Scouting's viewpoint "discriminatory," id. at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288. The district court substituted its judgment for the City's and invalidated the City's lease to Boy Scouts on the basis of the Establishment Clause. The district court erred on multiple grounds.

First, the district court's Order constitutes viewpoint discrimination against Boy Scouts, a violation of Boy Scouts' rights to Equal Protection, and an imposition of unconstitutional conditions. To single out Boy Scouts for disfavored treatment because of the court's own value judgments is precisely what the Constitution forbids.

Second, the district court erred in concluding that the Camp Balboa lease violated the Establishment Clause and related California Constitution provisions simply because the City negotiated exclusively with Boy Scouts for the Camp Balboa lease. The record shows that the City acted with a secular purpose in leasing to Boy Scouts. Plaintiffs did not provide, and the district court did not cite, any evidence showing that the City failed to act with a secular purpose or that the City's action had the primary effect of advancing religion. After acknowledging that Supreme Court authority requires taking into account the "history and context of the community and forum"—which included evidence that the City leases "publicly-owned land to 'well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City' without regard to whether the lessees are religious"—the district court excluded that evidence as irrelevant. The district court thus ignored the undisputed facts and law.

Third, Plaintiffs lack standing. Plaintiffs failed to produce any evidence of harm to the municipal fisc to substantiate municipal taxpayer standing. Indeed, Plaintiffs are indifferent to the financial terms of the lease; they are concerned only with the identity of the lessee. Plaintiffs testified that they would agree to another nonprofit—such as the YMCA—taking over the leases even if the same rent and lease terms applied. This case should have been dismissed without ever reaching the merits.

Fourth, the court's decision violates the summary judgment standard and is fraught with internal contradictions. The district court granted summary judgment for Plaintiffs on the basis of a theory raised for the first time at oral argument by the district court itself. While acknowledging that the City regularly enters into exclusive negotiations with lessees, the district court at the same time concluded the exclusive negotiations for Camp Balboa were an unconstitutional aberration.

ARGUMENT

This Court reviews a district court's grant of summary judgment de novo. Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1493 (9th Cir. 1996). "The district court's grant of a permanent injunction is reviewed for an abuse of discretion or an erroneous application of legal principles." Id. Furthermore, "[w]hen the district court upholds a restriction on speech as constitutional, we conduct a de novo review of the facts." Tucker v. State of California Department of Education, 97 F.3d 1204, 1209 n.2 (9th Cir. 1996).

I. THE CONSTITUTION FORBIDS THE SINGLING OUT OF BOY SCOUTS FOR DISFAVORED TREATMENT

The City could not have refused to lease to Boy Scouts based on opposition to Boy Scouts' values. The City's practice of leasing to nonprofits is a government forum, and no matter whether a designated, limited, or nonpublic

forum, the City was required to be viewpoint neutral. See Brown v. California Department of Transportation, 321 F.3d 1217, 1222 (9th Cir. 2003). To enjoin the Camp Balboa lease based on Boy Scouts’ views constitutes viewpoint discrimination, a violation of the right to Equal Protection, and the imposition of an unconstitutional condition on Boy Scouts. “[N]o man may vindicate his constitutional rights by requiring another to forego his own.” Littlejohn v. United States, 705 A.2d 1077, 1082 (D.C. 1997).

A. Government May Not Discriminate Based on Viewpoint

The First Amendment requires that Desert Pacific Council be permitted to participate in public programs on the same terms as other nonprofit organizations under a long line of forum analysis cases from the Supreme Court, this Court, and courts of appeals in other circuits. This Court recently explained the different government forums as follows:

In evaluating restrictions on speech, different standards apply depending on the type of forum involved. In a traditional public forum, such as a park or sidewalk, restrictions on speech are subject to strict scrutiny and regulations must be ‘narrowly drawn to achieve a compelling state interest.’ When a nontraditional forum is intentionally opened for public discourse, it creates a designated public forum, and restrictions are analyzed with the same strict scrutiny as traditional public fora. * * * All remaining property is nonpublic fora. The government may . . . create a ‘limited public forum’ by intentionally opening a nonpublic forum to certain groups or topics.

Hills v. Scottsdale Unified School District, 329 F.3d 1044, 1048-49 (9th Cir. 2003) (emphasis added and citations omitted). Here, in light of the policies and factors considered by the City in leasing property to nonprofits, the City created a limited public forum. See id.

In Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995), the Supreme Court found that a public university engaged in unconstitutional viewpoint discrimination when it denied funding to an otherwise eligible student publication on the basis of the publication's religious editorial viewpoint. 515 U.S. at 837.

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

Id. at 829 (emphasis added and citation omitted); see Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 392-94 (1993) (refusal to rent school building for "otherwise permissible" film series because of its religious viewpoint violated the principle that "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others," quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)); Good News Club v. Milford Central School, 533 U.S. 98 112 (2001) (government

violates the First Amendment when it excludes “speech discussing otherwise permissible subjects” because of the viewpoint of the speaker); Legal Services Corp. v. Velazquez, 531 U.S. 533, 548-49 (2001) (holding that the government violates the First Amendment when it conditions grants to lawyers on their not challenging validity of welfare laws).

The instant case is of course much easier than Rosenberger because there is no City funding of Boy Scouts here. (ER 60 (“the City spends nothing to maintain the facilities at Camp Balboa”).)

This Court has prohibited viewpoint discrimination with respect to municipal leases. In Metro Display Advertising, Inc. v. City of Victorville, 143 F.3d 1191, 1195 (9th Cir. 1998), the City of Victorville contracted with Metro Display to build bus shelters in exchange for being able to lease advertising space on those shelters. After a supermarket complained to the City about union ads on the shelters, the City told Metro Display that if it did not remove the ads, the City would find a pretext for canceling Metro Display’s contract. Metro Display sued, and the district court denied the City’s motion to dismiss based on qualified immunity. This Court affirmed, holding that “[t]he government cannot regulate a private individual’s speech in order to promote or restrain promotion of that individual’s viewpoint.” Id. at 1195 (emphasis added). This Court relied on the principle expressed in Rosenberger that “[i]t is axiomatic that the government may

not regulate speech based on its substantive content or the message it conveys.” 515 U.S. at 828 (emphasis added); see 143 F.3d at 1195. “Even in a nonpublic forum, . . . ‘the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.’” Metro Display, 143 F.3d at 1196 (quoting Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 806 (1985)); see Davey v. Locke, 299 F.3d 748, 756 (9th Cir. 2002) (“once [government] opens a neutral ‘forum’ (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion”), cert. granted, 123 S. Ct. 2075 (2003).

This Court has repeatedly prohibited viewpoint discrimination in other forums and programs, as well. See Hills v. Scottsdale Unified School District, 329 F.3d 1044, 1050-53 (9th Cir. 2003) (limited public forum: school district’s exclusion of religious summer camp brochures “constitutes impermissible viewpoint discrimination”); Brown v. California Department of Transportation, 321 F.3d 1217, 1222-25 (9th Cir. 2003) (nonpublic forum: the plaintiffs-appellees demonstrated probable success on the merits because Cal Trans’s policy of allowing citizens to hang U.S. flags but not banners with messages from highway overpasses is neither reasonable nor viewpoint neutral); Prince v. Jacoby, 303 F.3d 1074, 1091-92 (9th Cir. 2002) (limited public forum: a school district’s denial of benefits to religious clubs generally available to other clubs was “based purely on

. . . religious viewpoint in violation of the First Amendment”), cert. denied, 124 S. Ct. 62 (2003); Sammartano v. First Judicial District Court, 303 F.3d 959, 965-72 (9th Cir. 2002) (nonpublic forum: appellants demonstrated a “high probability of success on the merits” of their claim that courthouse rules banning clothing suggesting affiliation with “street gangs, biker or similar organizations” were neither reasonable nor viewpoint neutral); Tucker v. State of California Department of Education, 97 F.3d 1204, 1214-16 (9th Cir. 1996) (nonpublic forum: state agency’s ban on displaying religious materials outside employees’ cubicles or offices was neither reasonable nor viewpoint neutral).

Other circuits have consistently outlawed viewpoint discrimination involving government property. See DeBoer v. Village of Oak Park, 267 F.3d 558, 572 (7th Cir. 2001) (plaintiffs who “otherwise qualified as a group eligible to use the Village Hall facility for a civic event, cannot be directed by governmental authorities to format their presentation in a way that the government finds suitable”); Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles, 288 F.3d 610, 626 (4th Cir. 2002) (statute that authorized special state license plate for organization, but prohibited display of organization logo incorporating Confederate flag, constituted viewpoint discrimination in violation of First Amendment); Cuffley v. Mickes, 208 F.3d 702, 708, 711-12 (8th Cir. 2000) (exclusion of the Ku Klux Klan from a state Adopt-A-

Highway program constituted impermissible viewpoint discrimination); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 578 F.2d 1122, 1127-28 (5th Cir. 1978); see also Moore v. City of Van, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (city discriminated on the basis of content and viewpoint by excluding religious group from use of the community center).

Recently, in Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), Boy Scouts successfully challenged exclusion of Boy Scout groups from using Broward County school facilities after hours. The school district in Till claimed that Boy Scouts discriminated on the basis of sexual orientation and was thus ineligible to use school facilities by reason of the school's non-discrimination policy. Id. at 1297. However, the school district granted access to a multitude of other groups that restricted their membership or services to a particular race, ethnicity, or religion. Id. at 1303-04. Thus, citing Cornelius and Lamb's Chapel, along with Cuffley and Knights of the Ku Klux Klan, the court rejected the school district's argument, recognizing that the exclusion of Boy Scouts because of its constitutionally protected membership policy was impermissible viewpoint discrimination. Id. at 1308-09. "[I]n expressing its own message and setting its example for students to follow, the School Board cannot punish another group for its own message." Id. at 1308.

B. Government May Not Impose Unconstitutional Conditions

Even if Boy Scouts were seeking a “benefit” from the City rather than merely the same level of participation in a forum available to dozens of others, the Supreme Court has consistently held that government cannot condition access to government benefits on the relinquishment of First Amendment rights. When California unconstitutionally conditioned receipt of a tax exemption on taking of loyalty oath, the Supreme Court held that to “deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”

Speiser v. Randall, 357 U.S. 513, 518 (1958). See Board of County Commissioners v. Umbehr, 518 U.S. 668, 674 (1996); Rutan v. Republican Party of Illinois, 497 U.S. 62, 75 (1990); DeBoer v. Village of Oak Park, 267 F.3d 558, 572 (7th Cir. 2001) (group eligible to use forum “cannot be directed by governmental authorities to format their presentation in a way that the government finds suitable”); Andersen v. McCotter, 100 F.3d 723, 727 (10th Cir. 1996) (government may not “indirectly exert leverage to suppress speech by unconstitutionally tying the receipt of benefits to the speaker’s coerced silence”); Kinney v. Weaver, 301 F.3d 253, 269-71 & n.12 (5th Cir. 2002); Metro Display, 143 F.3d at 1195.

Here, the court has imposed an unconstitutional condition on Boy Scouts, i.e., to continue the lease, the Scouts must drop the views and membership requirements held constitutionally protected in Dale. But government may not condition participation in a program on abandonment of First Amendment freedoms. See Thomas v. Review Board, 450 U.S. 707, 716 (1981) (“a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program”); Speiser v. Randall, 357 U.S. 513, 518 (1958).

C. Government May Not Deny Equal Protection

Singling out of Boy Scouts from similarly situated groups also constitutes a violation of the Equal Protection Clause. E.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985); see Cuffley, 208 F.3d at 706 n.3 (“Whether this claim arises under the Equal Protection Clause or the First Amendment, it is clear that the State may not deny access to the Adopt-A-Highway program based on the applicant’s views”); LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester, 40 F.3d 587, 590-91 (2d Cir. 1994) (reversing summary judgment where evidence showed plaintiff was singled out for aggressive enforcement because of officials’ opposition to its expression); 42 U.S.C. § 2000cc(b)(1) (2002) (government must treat religious groups on equal terms with respect to land use regulations).

D. The District Court Erred By Singling Out Boy Scouts

The district court concluded that the leases in question are “a nonpublic forum in which the City selected its recipient by making the value judgment that the BSA-DPC alone is best suited to fulfill the City’s needs with respect to the parkland.” Barnes-Wallace, 275 F. Supp. 2d at 1287. As a nonpublic forum, any prohibition on leasing to Desert Pacific Council must be both (1) “reasonable in light of the purpose served by the forum” and (2) “viewpoint-neutral.” Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 806 (1985); see Metro Display, 143 F.3d at 1196.

First, the district court did not address how a prohibition on leasing to local Boy Scouts, in light of the purposes of the nonprofit leasing program, the purpose of the Balboa Park Master Plan to provide youth camping, and the varied expressive identities of all the other included lessees, would be reasonable.

Second, the district court concluded that “[t]he government’s decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization’s protected expression.”

275 F. Supp. 2d at 1288 (citing Cornelius and Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003)⁶).

The United States Supreme Court has already held that Boy Scouts' membership requirements based on the Scout Oath and Law are protected expressive association under the First Amendment. Boy Scouts of America v. Dale, 530 U.S. 640, 655 (2000). The government cannot invalidate a lease to Desert Pacific Council on the basis of Boy Scouts' exercise of First Amendment rights. "[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values." Id. at 651.

While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995); Healy v. James, 408 U.S. 169 (1972) (state college

⁶ In Wyman, the Second Circuit concluded that the State of Connecticut may "set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the BSA pays a price" for exercising its First Amendment rights." 335 F.3d at 95 n.8. Because Wyman conflicts with binding Supreme Court precedent, Boy Scouts intends to file a petition for a writ of certiorari with the United States Supreme Court on or before December 24, 2003. Indeed, the district court here and Second Circuit in Wyman adopt the position of the dissent in Dale, which clearly was rejected by the majority.

unconstitutionally interferes with a campus student political organization's First Amendment freedom of association by denying official recognition and access to university facilities because of the student organization's affiliation with a national socialist group). Governments which seek to censor private groups by excluding them from publicly available programs engage in viewpoint discrimination.

There is no question that Boy Scouts could not be barred from temporary use of City parkland: Balboa Park is a quintessential public forum. See, e.g., Kreisner v. City of San Diego, 1 F.3d 775, 783 (9th Cir. 1993) ("Balboa Park, a public park which is held open for various expressive activities, is unquestionably a traditional public forum."). Boy Scouts, as the largest youth camping organization in the country, undoubtedly would be oft-seen users of Balboa Park. The City can and does appoint institutional administrators with their own sets of values to administer City programs: Episcopal Community Services, Catholic Charities, and the Salvation Army receive outright City grants for public programs. (ER 572-75.) The answer cannot be different with respect to leases of City property. This is particularly true given that there are at least 100 leases to nonprofits, including many devoted to particular segments of the San Diego population. (See ER 65-70, 90-92.)

The undisputed evidence is that several membership or religious organizations—e.g., Girl Scouts, Jewish Community Center—serve as gatekeepers

for City property that they both use for their own purposes and make available to the community at large. (ER 152 ¶ 9, 576-93, 651.) Those organizations may serve one sex, one age group, or one religion with respect to their own constituency, and yet perform a valuable service for the community at large. Other nonprofit groups lease City property at little or no rent, and the City does not require that they serve the community beyond their own ethnic group or religion. The San Diego Calvary Korean Church, for example, is a Christian church solely serving the Korean-speaking community. (ER 177-78.)

The district court concluded that how the City treats other lessees is irrelevant because the City has no “program” or “criteria” for leasing to community organizations. (But see Policy No. 700-04 (Balboa Park) (ER 99-101); Policy No. 700-08 (Mission Bay Park) (ER 93-98); Balboa Park Master Plan (ER 112-14); Mission Bay Park Master Plan (ER 105-11).) However, a government need not have a created a formal program: the mere fact that a government has a practice of opening its property or offers benefits to outside organizations is enough to create a public forum. In Widmar v. Vincent, 454 U.S. 263 (1981), the university encouraged the activities of student organizations, recognized over 100 student groups, and provided University facilities for the meetings of registered organizations. The Supreme Court noted that “[t]hrough its policy of accommodating their meetings, the University has created a forum

generally open for use by student groups.” Id. at 267; see Searcey v. Crim, 815 F.2d 1389, 1392-95 (11th Cir. 1987) (board of education’s barring of participation by “peace activists” in bulletin board posts, guidance offices services, and school career days constituted First Amendment violation).

The City’s nonprofit leasing program is a program to save the City money and provide the community with services through willing nonprofits. It is not a program to send a particular City message to the community. Therefore, the district court’s reliance on National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), is misplaced.

In Finley, the Supreme Court considered a facial challenge to a statute requiring the NEA to ensure that ““artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”” 524 U.S. at 572 (quoting 20 U.S.C. § 954(d)(1) (1990)). The Court held that such subjective criteria did not render the statute facially invalid or unconstitutionally vague because the very purpose of the program was to promote the program’s view of artistic merit. Id. at 584-86. Indeed, the Court’s dicta undermines the rationale of the district court’s decision here:

If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision

of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas,’ . . . and if a subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief could be appropriate.

Id. at 587 (quoting Regan v. Taxation With Representation of Washington, 461 U.S. 540, 550 (1983), and Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)) (emphasis added); Rosenberger, 515 U.S. at 834 (“It does not follow, however, and we did not suggest in Widmar, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors”). Conditioning access to the opportunity to lease City property on abandonment of a group’s First Amendment rights is a classic unconstitutional condition, and bears no relationship to situations involving government provision of funding to further a government program or message.

The same First Amendment that requires the State of Missouri to permit the Klan to adopt a highway, requires the State of Virginia to allow the Sons of Confederate Veterans their vanity license plate, and requires schools across the country to open their doors to religious organizations on equal terms, requires the City of San Diego to include local Boy Scouts in the City leasing program as long as they are suitable lessees of campgrounds. The district court erred by singling out Boy Scouts for exclusion based on their viewpoint.

II.
THE CAMP BALBOA LEASE DOES NOT VIOLATE
THE ESTABLISHMENT CLAUSE

A. The District Court Misapplied Binding Establishment Clause Authority

The City's lease to Desert Pacific Council does not violate the Establishment Clause under any reading of Supreme Court controlling authority. Under the so-called "Lemon test"—derived from Lemon v. Kurtzman, 403 U.S. 602 (1971), and subsequently modified—government action does not violate the Establishment Clause if (1) the government acted with a secular purpose and (2) the action does not have the primary effect of advancing or inhibiting religion. See Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (plurality); Agostini v. Felton, 521 U.S. 203, 222-23, 232-33 (1997); Lemon, 403 U.S. at 612-13; American Family Assoc., Inc. v. City & County of San Francisco, 277 F.3d 1114, 1121 (9th Cir.), cert. denied, 123 S. Ct. 129 (2002); Vernon v. City of Los Angeles, 27 F.3d 1385, 1396 (9th Cir. 1994); Kreisner v. City of San Diego, 1 F.3d 775, 781 (9th Cir. 1993). The “three primary criteria” that the Supreme Court “currently use[s] to evaluate whether government aid has the effect of advancing religion” are whether the aid (a) “result[s] in governmental indoctrination,” (b) “define[s] its recipients by reference to religion,” or (c) “create[s] an excessive entanglement” with religion. Agostini, 521 U.S. at 234; see Mitchell, 530 U.S. at 807-08. The Camp Balboa lease passes muster under the Lemon test, and the district court erred

in concluding otherwise. See, e.g., Moore v. City of Van, 238 F. Supp. 2d 837, 849-50 (E.D. Tex. 2003) (a neutral city policy allowing equal access to community center by religious and non-religious groups alike “clearly” meets all prongs of the Lemon test).

1. The City Acted for a Secular Purpose

Plaintiffs admit that the City’s motivations are secular. (Pls.’ Mem. at 14 (“here, the government offers a secular rationale”).)⁷ According to Plaintiffs, the City maintains that the “leases of public parkland to [Desert Pacific Council] benefit the youth of San Diego and the community as a whole by providing recreational facilities for young people.” (Id. at 27.) “[T]he City determined that leasing parkland to [Desert Pacific Council] advances the public policy of San Diego and is the best use for the properties in question.” (Id. at 2.)

As this Court explained in Kreisner, “[a] practice will stumble on the purpose prong ‘only if it is motivated wholly by an impermissible purpose.’” 1 F.3d at 782 (9th Cir. 1993) (quoting Bowen v. Kendrick, 487 U.S. 589, 602 (1988)); see American Family, 277 F.3d at 1121. If there is a “plausible secular purpose” for the City’s action, it will not be found to have the purpose of advancing religion. Kreisner, 1 F.3d at 782 (erection of overtly religious holiday

⁷ District court docket entry 152.

display in Balboa Park did not violate purpose prong); Christian Science Reading Room v. City & County of San Francisco, 784 F.2d 1010, 1014 (9th Cir.) (lease to religious organization had valid secular purpose), amended by 792 F.2d 124 (9th Cir. 1986). “A reviewing court must be ‘reluctant to attribute unconstitutional motives’ to government actors in the face of a plausible secular purpose.” Kreisner, 1 F.3d at 782 (quoting Mueller v. Allen, 463 U.S. 388, 394-95 (1983)). “The Supreme Court has made it clear that a policy of permitting open access to a public forum, including non-discriminatory access for religious speech, is a valid secular purpose.” Id. (citing Board of Education v. Mergens, 496 U.S. 226, 249 (1990), and Widmar v. Vincent, 454 U.S. 263, 271 (1981)).

The district court appears to have concluded that the City acted with a secular purpose in leasing to Desert Pacific Council: “The purpose of the lease was to construct, operate and maintain a Boy Scout Headquarters and to conduct such exercises thereon as are in keeping with the principle and practices of Boy Scouting, without discrimination as to race, color, or creed.” 275 F. Supp. 2d at 1264 (paraphrasing the express purpose of the 1957 lease); Apr. 13, 2001 Order at 3 (ER 3) (the property is leased “for the purposes of a Boy Scout recreational facility and related administrative offices . . . and for such other related or incidental purposes as may be first approved in writing by the City manager.”). (See ER 77, 287.) The district court acknowledged that “the City selected its

recipient by making the value judgment that [the local Boy Scout council] alone is best suited to fulfill the City's needs with respect to the parkland." 275 F. Supp. 2d at 1287 (emphasis added).

2. The Camp Balboa Lease Does Not Have the Primary Effect of Advancing Religion

This Court has said that "the focus of this prong is on the primary effect of the government's conduct." American Family, 277 F.3d at 1122 (emphasis in original). Neither the City's leasing program as a whole nor the lease of Camp Balboa to Boy Scouts has the primary effect of advancing religion because, from the standpoint of a "reasonable observer," neither results in "governmental indoctrination," neither is defined "by reference to religion," and neither creates an "excessive entanglement" with religion. Agostini, 521 U.S. at 234; see Mitchell, 530 U.S. at 807-08. Government benefits do not have the primary effect of advancing religion when they are "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [are] made available to both religious and secular beneficiaries on a nondiscriminatory basis." Agostini, 521 U.S. at 231. The Constitution is not violated "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." Good News Club v. Milford Central School, 533 U.S. 98, 114 (2001); see Mitchell, 530 U.S. at 830; Agostini, 521 U.S. at 231; Prince v. Jacoby, 303 F.3d 1074, 1093

(9th Cir. 2002); Kreisner, 1 F.3d at 785. Since the City program includes over 100 other nonprofits, both religious and secular, there can be no doubt that this proof is satisfied. (ER 65-70, 90-92.)

Whether the City's actions have the primary effect of advancing or inhibiting religion is determined from the perspective of a "reasonable observer." American Family, 277 F.3d at 1122; see Kreisner, 1 F.3d at 784. "This hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the Free Speech Clause and public forum doctrine." Kreisner, 1 F.3d at 784 (emphasis added).

This Court has analyzed the primary effect in two cases directly on point. In Christian Science Reading Room v. City & County of San Francisco, 784 F.2d 1010 (9th Cir.), amended by 792 F.2d 124 (9th Cir. 1986), the Court rejected an Establishment Clause challenge to the lease of space in a municipal airport stating that, while the religious organization did "receive some benefit," there was no effect of advancing religion because "the benefits of rental space at the airport [were] generally available" to a variety of groups. Id. at 1015 (emphasis added). The government did not endorse the Christian Scientists, since, if it did, it would also be "endorsing the business and labor practices of the domestic airlines, the politics and policies of the foreign governments that own airlines, the consumption

of alcohol and sourdough bread, . . . the reading of Penthouse magazine” and the views of all the other organizations leasing space at the airport. Id.

Similarly, in Kreisner, this Court held that the City of San Diego did not impermissibly advance religion when it permitted a private, overtly religious holiday display to be erected in Balboa Park. See 1 F.3d at 785. By granting permits to both religious and nonreligious groups, the City,

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

Id. at 784 (emphasis added) (citation omitted).

The district court here recognized the proper standard. “The correct inquiry here, under recent Supreme Court precedent, is whether government aid has the effect of advancing religion because the leases either result in governmental indoctrination or define their recipient by reference to religion.”

275 F. Supp. 2d at 1270; see id. at 1266.

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. The ‘reasonable observer’ perspective establishes at least some measure of objectivity because the ‘reasonable observer’ is ‘deemed aware of the history and context of

the community and forum' in which the Establishment Clause challenge arises.

Id. at 1270 (citations omitted).

Yet the district court failed to apply the standard set forth above.

Plaintiffs produced no evidence that the lease program or the Camp Balboa lease results in “governmental indoctrination,” that the City defines lessees “by reference to religion,” or that the program or the lease creates an “excessive entanglement” with religion. Agostini, 521 U.S. at 234. Nor did the district court discuss any of these “primary criteria” used “to evaluate whether government aid has the effect of advancing religion.” Id. Rather, the district court concluded that the Camp Balboa lease offends the Establishment Clause simply because Boy Scouts have internal religious requirements for members.

Under the “reasonable observer” test, the district court was required to take into account the 100-plus other leases to a wide variety of “religious, areligious and irreligious” nonprofits on similar lease terms. (ER 65-70, 90-92.) Any reasonable observer familiar with the full history and context of the City’s leases to nonprofit organizations would view the leases to Desert Pacific Council as one aspect of a broader undertaking to provide recreational facilities to community children, not as an endorsement of religion. See Zelman v. Simmons-Harris, 536 U.S. 639, 655-56 (2002).

Here, however, the district court dismissed out of hand the undisputed evidence of the “history and context” of the City’s leasing practices with a wide variety of community organizations. 275 F. Supp. 2d at 1273-74. The district court concluded that “[a] reasonable observer would most naturally view the exclusive negotiations and effective preclusion of secular groups as the City’s endorsement of the BSA-DPC because of its inherently religious program and practices.” *Id.* at 1276. First, the record shows that the exclusive negotiations were not intended to exclude, and did not exclude, others from submitting a bid. (ER 813; see ER 663 ¶ 12, 674 ¶ 56.) Second, the City regularly engages in exclusive negotiations if, in the City’s judgment, that is the best way for them to get the City the best deal. See 275 F. Supp. 2d at 1274-75; (ER 813, 1010-11, 1064.) An interest in getting the City the best deal is an interest neutral toward religion by definition.

If all of the City leases that result from exclusive negotiations are unconstitutional under the Establishment Clause because, by definition, they are not “available to the religious, areligious and irreligious on a neutral basis,” then dozens of City leases are invalid. 275 F. Supp. 2d at 1275.⁸ If the rule applies only

⁸ Under this reading, the City’s exclusively negotiated leases with Girl Scouts, YMCA, Hillel of San Diego, Black Police Officers Association, San Diego

(Footnote continued on next page)

to Boy Scouts, then the district court has singled out Boy Scouts based exclusively on Boy Scouts' viewpoints.

To exclude Boy Scouts based on their duty to God belief is a preference for atheism over theism and is unconstitutional. The court below adopted a position of "not neutrality but hostility toward religion." Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 248 (1990). Discriminating against local Boy Scouts as lessees on religious grounds is itself unconstitutional. See Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 393-95 (1993); School District of Abington Township v. Schempp, 374 U.S. 203, 225 (1963); Keisner, 1 F.3d at 779 n.2.

B. The District Court Misapplied Binding State Law

The district court erred in granting summary judgment under the California Constitution.

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Hebrew Day School, Sherman Heights Community Center, Neighborhood House Association, Presidio Hills Golf Course, Air Adventures Skydiving, Orfila Vineyards, Mission Bay Sailing Center, and many others all would violate the First Amendment.

1. The Lease Does Not Violate the Establishment Clause or the No Preference Clause of the California Constitution

Article I, section 4 of the California Constitution contains both an “Establishment Clause” which is identical to that contained in the federal Constitution and the so-called “No Preference” Clause, which provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” Cal. Const. art. I, § 4.

An action based on article I, section 4 of the California Constitution, like a First Amendment challenge, is analyzed “by reference to Lemon v. Kurtzman.” Paulson v. City of San Diego, 294 F.3d 1124, 1129 (9th Cir. 2002). California’s Establishment Clause cannot be “any more protective” than the First Amendment. East Bay Asian Local Development Corp. v. State, 24 Cal. 4th 693, 718-19, 13 P.3d 1122, 1139 (2000).

Furthermore, with respect to the No Preference Clause, the California Supreme Court concluded that if a challenged act “satisfies all prongs of the Lemon test, it follows that [it] is neither a governmental preference for or discrimination against religion.” 24 Cal. 4th at 719, 13 P.3d at 1139.

Because there is no federal Establishment Clause violation, there is no state Establishment Clause and no state No Preference Clause violation.

2. The Lease Does Not Violate the No Aid Clause of the California Constitution

The “No Aid” Clause of the California Constitution, a so-called “Blaine Amendment,” provides that:

Neither the legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.

Cal. Const. art. XVI, § 5 (emphasis added). The No Aid Clause prohibits the “government from (1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government’s secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental.” Paulson v. City of San Diego, 294 F.3d 1124, 1131 (9th Cir. 2002) (emphasis added).

First, neither Boy Scouts of America nor Desert Pacific Council is a “religious sect, church, creed, or sectarian purpose” or an “institution controlled by any religious creed, church, or sectarian denomination.” Cal. Const. art. XVI, § 5. Desert Pacific Council and Boy Scout of America are explicitly nonsectarian. (ER 405-06, 441.) Plaintiffs concede that “Boy Scouts of America is not a

religious sect” and that Desert Pacific Council “is not a house of worship like a church or synagogue.” (ER 626 ¶ 185; see ER 702 ¶ 185.) And although sectarian groups support Scouting nationally (less so in San Diego), there is no evidence that any one in particular “control[s]” Boy Scouts nationally or locally.

Second, any benefit of the Camp Balboa lease to Desert Pacific Council is indirect, remote, or incidental. There is no doubt that Boy Scouts would be major users of the campgrounds no matter if the City itself or another lessee maintained the property. Moreover, any additional benefit the Scouts derive from the lease of Camp Balboa is incidental to the millions of dollars they put into it. Finally, there can be doubt that any benefit to Scouts is incidental to the City’s leasing program as a whole.

Even if Boy Scouts were a covered “religious sect,” which they are not, article XVI, section 5 “has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose.” California Educational Facilities Authority v. Priest, 12 Cal. 3d 593, 605, 526 P.2d 513, 521 (1974) (emphasis added). “Two factors have been held to be particularly relevant in determining whether benefits received are incidental: first, there must not be ‘any imprimatur of state approval on religious sects or practices,’ and second, the benefits must be generally available to others besides

religious groups.” Christian Science Reading Room v. City & County of San Francisco, 784 F.2d 1010, 1014 (9th Cir. 1986) (quoting Widmar, 454 U.S. at 274); see id. at 1016.

The undisputed primary purpose of the City leasing program is secular. (See, e.g., Policy No. 700-04 (ER 99-101); Policy No. 700-08 (ER 93-98).) The City leases to many different nonprofit organizations on similar terms without regard to the organization’s internal membership requirements. The undisputed primary purpose of the Camp Balboa lease was a “secular” decision to use City parkland for recreation facilities for young people. See 275 F. Supp. 2d at 1264 (paraphrasing the express purpose of the 1957 lease); Apr. 13, 2001 Order at 3 (the property is leased “for the purposes of a Boy Scout recreational facility and related administrative offices”). (See ER 77, 287.) If leasing parkland to Desert Pacific Council on the same terms as dozens of other leases to nonprofits is somehow a benefit to religious activity, it certainly is too tenuous to be anything but indirect, remote, or incidental. See Christian Science Reading Room, 784 F.2d at 1015 (any benefit to Christian Scientists was incidental because “the benefits of rental space at the Airport are generally available to all who wish to hawk their wares”); Woodland Hills Homeowners Organization v. Los Angeles Community College District, 266 Cal. Rptr. 767, 775-76 (Cal. Ct. App. 1990) (alleged below-market lease of municipal property for exclusive use by synagogue was

permissible because the “primary purpose” for the lease was secular, any benefits “other than the ordinary consequences resulting from the lease of real property” were incidental, and “religious and secular groups had equal opportunity to obtain the government benefit”); Hawley v. City of Cleveland, 24 F.3d 814, 818 (6th Cir. 1994) (noting that 16 other airports in the United States lease space to religious groups for chapels).⁹

Finally, the California Constitution certainly cannot act to punish Boy Scouts or treat them differently because they believe in doing their “duty to God.” That would be unconstitutional discrimination against religion. See Kreisner, 1 F.3d at 778 n.2 (“a state’s interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause and the Free Speech Clause [of the U.S. Constitution] as well”). The California Constitution cannot be interpreted in a manner inconsistent with the U.S. Constitution or other federal law.

⁹ The City permits religious weddings, with visible religious symbols, among the hundreds of weddings each year in Balboa Park and Presidio Park. (ER 658.) The City permits other religious services and events in Balboa Park. For example, a church rented the Spreckels Organ Pavilion in Balboa Park for a Good Friday service on March 29, 2002; another church rented the Organ Pavilion for an Easter sunrise service on March 31, 2002; and Christian Crusade rented the Organ Pavilion for an event on April 2, 2002. (Id.)

III. PLAINTIFFS LACK STANDING

The Supreme Court has stated that the party invoking the court's jurisdiction must show (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) that the injury "fairly can be traced to the challenged action," and (3) that the injury "is likely to be redressed by a favorable decision." Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982) (internal citations omitted).

Plaintiffs lack Article III standing to pursue their claims in federal court. Plaintiffs never attempted to use the properties at issue, Apr. 13, 2001 Order at 8 (ER 8); (see ER 374, 367, 384, 376-77, 630 ¶ 9), and Plaintiffs have not established municipal taxpayer standing, the only remaining basis for standing in this case.¹⁰ See Valley Forge, 454 U.S. at 475-76; ACLU-NJ v. Township of Wall,

¹⁰ The district court ruled before discovery that Plaintiffs Breen might have an injury in fact to the extent they were exposed to two small "Scout chapel" signs formerly on the property. (See ER 8.) Plaintiffs Breen were never exposed to any such sign because they have never been on the property (ER 376, ER 383, ER 387), and the signs were not visible from outside the property. (ER 280 ¶ 17.) Valerie Breen only recalled seeing a photograph (ER 386), and Michael Breen had no knowledge of any religious symbols at Camp Balboa (ER 378). See Liddle v. Corps of Engineers of the United States Army, 981 F. Supp. 544, 557 (M.D. Tenn. 1997) (plaintiffs alleging that the Corps violated the First

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246 F.3d 258, 261 (3d Cir. 2001) (plaintiffs bear the burden of establishing standing).

For municipal taxpayer standing, Plaintiffs must show that the City would have spent fewer of its tax dollars had it not leased property to Desert Pacific Council. Here, there is no evidence that the City spent any tax dollars at all on the properties at issue. Furthermore, the only evidence presented shows that if the Camp Balboa lease were cancelled, the City would lease to another nonprofit on the same lease terms. (ER 63.) Plaintiffs would be content with this, even if the same rent and lease terms applied. (ER 744, 756, 766-68, 775.) Thus, to rescind the lease to Boy Scouts and lease to another nonprofit does not even remotely redress a taxpayer claim.¹¹

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Amendment by leasing parkland to a Christian organization lacked standing because they were not subjected to “unwelcome religious exercises or displays” nor were they “forced to assume special burdens in order to avoid confronting such exercises or displays”). In any event, the signs were removed almost two years ago, the primitive structure of benches forming an amphitheatre has been removed, and the area is being converted to a climbing wall. (ER 280, 442.)

¹¹ Indeed, the only way Plaintiffs’ experts could claim a financial loss to taxpayers was to claim that if by a two-thirds vote of citizens of San Diego voted to remove the parkland dedication, the parkland could be developed for hotels and restaurants! (See ER 808-11 (“hypothetical assumptions”), 869 (“valuation potential” of the property), 871 (giving “prospective valuation of the property,” but “[b]eyond that, I neither bet on horse racing nor am I going to speculate on

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In Valley Forge, the respondents lacked standing to challenge the government's transfer of public lands as government surplus because they could not allege a sufficient personal injury caused by the alleged constitutional violation. See 454 U.S. at 485-90. The Department of Health, Education and Welfare gave, free of charge, a 77-acre tract of land containing an Army hospital and appraised at \$577,500 to the Valley Forge Christian College. Id. at 467-68. The college, whose faculty members were required to be "baptized in the Holy Spirit" and to live "Christian lives" and whose administrators had to be affiliated with the Assemblies of God, planned to use the property to expand their program of training "men and women for Christian service as either ministers or laymen." Id. at 468-69 (citation omitted).

The Supreme Court noted that "there is no basis for believing that a transfer to a different purchaser would have added to the Government receipts" since "the ultimate purchaser would, in all likelihood, have been another non-profit institution . . . rather than a purchaser for cash." Valley Forge, 454 U.S. at 480 n.17. The transfer of property to a religious organization that would maintain it

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reasonableness of a two-thirds vote").) This result in no event can be termed likely.

would not suffice to confer taxpayer standing on a plaintiff where the government, if prevented from making the sale, would simply have donated it to another non-profit organization.

The specific test for municipal taxpayer standing is the requirement of a “pocketbook injury” derived from Doremus v. Board of Education, 342 U.S. 429 (1952). See Doe v. Madison School District No. 321, 177 F.3d 789, 793 (9th Cir. 1999); Cammack v. Waihee, 932 F.2d 765, 770 (9th Cir. 1991). Plaintiff must allege “specific amounts of money that the government ha[s] spent solely on the unlawful activity.” Doe, 177 F.3d at 794. The complaint “must ‘set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity.’” Cantrell v. City of Long Beach, 241 F.3d 674, 683 (9th Cir. 2001) (quoting Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (9th Cir. 1984)). If the taxpayer fails to “allege a direct injury caused by the expenditure of tax dollars,” there is no taxpayer standing. Id.

Similarly, this Court analyzed municipal taxpayer standing in the context of a claim that a school district’s policy permitting student prayers at high school graduations violated the Establishment Clause. In Doe, this Court stated, “‘taxpayer standing,’ by its nature, requires an injury resulting from a government’s expenditure of tax revenues.” 177 F.3d at 793. The plaintiff alleged that the defendants “spent tax dollars on renting a hall, printing graduation

programs, buying decorations, and hiring security guards” for the graduation. Id. at 794. However, because these expenditures “are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer,” the court held that “those expenditures cannot establish taxpayer standing.” Id. Because the plaintiff identified no municipal expenditures “occasioned solely by” the challenged activity—i.e., the graduation prayer—the court held that the plaintiff did not have municipal taxpayer standing. Id. at 793-94; see Cantrell, 241 F.3d at 683 (holding that the plaintiffs did not have standing where they did not show that tax dollars were used to carry out the challenged activity); ACLU-NJ v. Township of Wall, 246 F.3d at 263-64 (holding that plaintiffs had “failed to establish that the Township has spent any money, much less money obtained through property taxes,” on religious elements of a particular holiday display, thereby failing to establish a good-faith pocketbook action).

In addition to demonstrating a measurable appropriation or disbursement of municipal funds, Plaintiffs must also satisfy the causation and redressability requirements by proving that the challenged expenditure caused the injury and that the injury likely would be redressed by a favorable decision. Valley Forge, 454 U.S. at 472. In the context of taxpayer standing, the injury is the loss to the municipal fisc resulting from the challenged expenditures. See Doe, 177 F.3d at 793 (injury required for taxpayer standing is from improper expenditure of tax

revenues); Reimers v. Oregon, 863 F.2d 630, 632 n.4 (9th Cir. 1988) (holding that Pentecostal prisoner challenging prison chaplaincy program did not have taxpayer standing because he was complaining about requirement that a specific religion, Roman Catholicism, be represented on chaplain staff rather than a disbursement of state funds).

In the present case, there is no evidence of a challenged expenditure much less a loss to the municipal fisc. The City has a policy of leasing parkland to nonprofits that provide services to the general public. (ER 93-101.) It is undisputed that the leased properties, as dedicated parkland subject to severe use restrictions, have no meaningful market value. (ER 59, 63, 263, 266-67, 401, 803, 805-06, 807-08, 880.) As a result, the City leases dedicated parkland to nonprofits at nominal rents.

Plaintiffs do not challenge the City's leasing of the properties on such terms or the properties' use for youth recreation. Rather, they object to Desert Pacific Council being the nonprofit lessee. Plaintiffs have not and cannot identify any measurable appropriation or disbursement of municipal funds occasioned solely by the fact that the properties are leased to and operated by Desert Pacific Council. As a result, Plaintiffs cannot establish municipal taxpayer standing.

**IV.
THE DISTRICT COURT IGNORED THE
SUMMARY JUDGMENT STANDARD**

The district court erred by basing its holding on a legal theory that was never asserted by Plaintiffs but was raised sua sponte by the district court at the March 10, 2003 hearing on the motions for summary judgment. See Gasser Chair Co., Inc. v. Infanti Chair Manufacturing Corp., 60 F.3d 770, 777-78 (Fed. Cir. 1995) (“A court may enter summary judgment on a ground different from those mentioned in the motion only ‘if the parties have had an adequate opportunity to argue and present evidence on that point and summary judgment otherwise is appropriate.’” (Quoting 10A Charles A. Wright, et al., Federal Practice and Procedure § 2719, at 15 (2d ed. 1983).); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292-94 (9th Cir. 2000) (plaintiffs may proceed on a new theory “[o]nly if the defendants have been put on notice”); see also Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986) (“at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”).

Plaintiffs’ claim that the Camp Balboa lease violated the Establishment Clause was never based on the allegation that the City negotiated exclusively with Desert Pacific Council. Rather, Plaintiffs alleged that by leasing to Desert Pacific at all for “\$1 per year . . . plus an additional \$2,500 annual

administrative fee” (ER 23), the City was subsidizing Boy Scouts. In a previous ruling, the district court explained that Plaintiffs “are challenging an allegedly illegal and significant expenditure of municipal tax dollars.” (ER 15.) Plaintiffs never alleged that their Establishment Clause claim would have been resolved had the City conducted a request for proposal rather than exclusive negotiations. In fact, they alleged and testified that Boy Scouts are an inappropriate lessee without regard to the leasing procedures. (See ER 34-36, 367-68, 371,-73, 379-81, 384, 629-31, 637-40.)

The San Diego City Council minutes shows that the City negotiated exclusively with numerous other organizations (see note 3, supra), and Girl Scouts negotiated in the same time and manner as Boy Scouts (see ER 62-63, 256-57, 322-23, 563-68). The parties never pursued this in discovery because this was not a basis of any of Plaintiffs’ claims. The district court, no more than Plaintiffs, may change the theory of the case after summary judgment motions have been fully briefed. See Coleman, 232 F.3d at 1292-94.

CONCLUSION

For all of the foregoing reasons, the district court's Order should be reversed.

Dated: December 8, 2003



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CERTIFICATE OF COMPLIANCE

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

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14-points or more, and contains 13,955 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 8, 2003

A handwritten signature in black ink, appearing to read 'Scott H. Christensen', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2003, I served copies of the Brief for Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America on the following attorneys by way of First-Class Mail or other class of mail that is at least as expeditious:

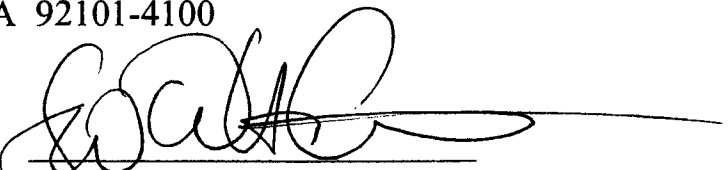
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