

IN THE SUPREME COURT OF THE STATE OF OREGON

NANCY POWELL, Individually, and as Guardian Ad
Litem for REMINGTON POWELL,

Petitioners-Respondents-Cross-
Appellants, Respondents on Review,

v.

STAN BUNN, Superintendent of Public Instruction,
OREGON DEPARTMENT OF EDUCATION, and
PORTLAND PUBLIC SCHOOL DISTRICT NO. 1J,

Respondents-Appellants-Cross-
Respondents, Petitioners on Review.

Multnomah County Circuit
Court No. 010403557

Court of Appeals No. A117310

Supreme Court Nos. S52657, S52659

**BRIEF OF *AMICUS CURIAE* BOY SCOUTS OF AMERICA
IN SUPPORT OF PETITIONERS ON REVIEW**

On Petition for Review of the Decision of the Court of Appeals
on Appeal From a Judgment of the Circuit Court for Multnomah County,
Honorable ELLEN F. ROSENBLUM, Judge

Court of Appeals Opinion Filed:	March 2, 2005
Author of Opinion:	Brewer, C.J.
Concurring Judges:	Armstrong, Wollheim, Schuman, and Ortega, J.J.
Specially Concurring Judge:	Linder, J.
Dissenting Judges:	Landau, Edmonds, and Haselton, J.J.

(Counsel listed on inside cover)

March 7, 2006

Kenneth A. Wittenberg #96129
Attorney at Law
805 SW Broadway, Suite 1900
Portland, Oregon 97205
Telephone: (503) 227-1724

Charles F. Hinkle
STOEL RIVES LLP
900 SW 5th Avenue, Suite 2600
Portland, Oregon 97204
Telephone: (503) 294-9266

Attorneys for Petitioners-Respondents-Cross-
Appellants, Respondents on Review
Nancy Powell and Remington Powell

William H. Walters #83481
MILLER NASH LLP
111 SW 5th Avenue, Suite 3500
Portland, Oregon 97204
Telephone: (503) 224-5858

Attorneys for Respondent-Appellant-Cross-
Respondent, Petitioner on Review
Portland Public School District No. 1J

Hardy Myers #64077
Attorney General
Mary H. Williams #91124
Solicitor General
Janet A. Metcalf #72166
Assistant Attorney General
STATE OF OREGON DEPARTMENT OF
JUSTICE
1162 Court Street, Suite 400
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Respondents-Appellants-Cross-
Respondents, Petitioners on Review
Stan Bunn, Superintendent of Public
Instruction, and Oregon Department of
Education

Thomas V. Dulcich #80210
Sara Kobak #02349
SCHWABE WILLIAMSON & WYATT P.C.
Pacwest Center, Suites 1600-1800
1211 Southwest Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-9981

Timothy R. Volpert #81407
P. Andrew McStay, Jr. #03399
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, Oregon 97201-5630
Telephone: (503) 241-2300

George A. Davidson (admission *pro hac vice*
pending)
Carla A. Kerr (admission *pro hac vice*
pending)
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Attorneys for *Amicus Curiae* Boy Scouts of
America

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
QUESTION PRESENTED AND PROPOSED RULE OF LAW	2
Question Presented.....	2
Proposed Rule of Law.....	2
STATEMENT OF FACTS	3
The Boy Scouting Program.....	3
Boy Scout Recruiting.....	4
ARGUMENT	5
THE COURT OF APPEALS’ INTERPRETATION OF ORS 659.850 IS FLAWED	5
A. Allowing Boy Scouts Equal Access Does Not Constitute Discrimination.....	6
1. Nothing Even Arguably Religious Occurs at the Schools.....	6
2. The Public Schools Do Not Discriminate Against Anyone by Opening School Facilities to a Wide Spectrum of Groups	10
B. Interpreting ORS 659.850 to Require the Exclusion of Boy Scouts Would Violate the Constitution.....	12
C. Portland Public School District Must Provide Equal Access to Boy Scouts on Pain of Losing Federal Funding	14
CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

CASES

<i>Boy Scouts of America v. Dale</i> , 530 US 640, 120 S Ct 2446, 147 L Ed 2d 554 (2000).....	12
<i>Boy Scouts of America v. District of Columbia Comm’n on Human Rights</i> , 809 A2d 1192 (DC 2002)	11
<i>Boy Scouts of America v. Till</i> , 136 F Supp 2d 1295 (SD Fla 2001).....	13-14
<i>Bronx Household of Faith v. Board of Education</i> , 331 F3d 342 (2d Cir 2003)	13
<i>Chicago Area Council of Boy Scouts of America v. City of Chicago Comm’n on Human Relations</i> , 322 Ill App 3d 17, 748 NE2d 759 (2001), <i>dismissed in Richardson v. Chicago Area Council of Boy Scouts of America</i> , No. 92-E-80 (Chicago Comm’n on Human Relations Feb. 19, 2003)	11
<i>Child Evangelism Fellowship of Maryland, Inc v. Montgomery County Public Schools</i> , 373 F3d 589 (4th Cir 2004)	13
<i>Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District</i> , 386 F3d 514 (3d Cir 2004)	13
<i>City of Cleburne v. Cleburne Living Center</i> , 473 US 432, 105 S Ct 3249, 87 L Ed 2d 313 (1985).....	14
<i>Curran v. Mount Diablo Council of the Boy Scouts of America</i> , 17 Cal 4th 670, 952 P2d 218 (1998).....	11
<i>Donovan v. Punxsutawney School Board</i> , 336 F3d 211 (3d Cir 2003)	13
<i>Good News Club v. Milford Central School</i> , 21 F Supp 2d 147 (NDNY 1998), <i>aff’d</i> , 202 F2d 502 (2d Cir 2000), <i>rev’d on other grounds</i> , 533 US 98, 121 S Ct 2093, 150 L Ed 2d 151 (2001)	9
<i>Good News Club v. Milford Central School</i> , 533 US 98, 121 S Ct 2093, 150 L Ed 2d 151 (2001).....	12-13
<i>Good News/Good Sports Club v. School District of the City of Ladue</i> , 859 F Supp 1239 (ED Mo 1993), <i>rev’d on other grounds</i> , 28 F3d 1501 (8th Cir 1994), <i>cert den</i> , 515 US 1173 (1995)	8-9
<i>Hills v. Scottsdale Unified School District</i> , 329 F3d 1044 (9th Cir 2003), <i>cert den</i> , 540 US 1149 (2004).....	13

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Lamb’s Chapel v. Center Moriches Union Free School District</i> , 508 US 384, 113 S Ct 2141, 124 L Ed 2d 352 (1993)	12-13
<i>Myers v. Loudoun County School Board</i> , 251 F Supp 2d 1262 (ED Va 2003), <i>aff’d</i> , 418 F3d 395 (4th Cir 2005)	15
<i>Perry v. Sindermann</i> , 408 US 593, 92 S Ct 2717, 33 L Ed 2d 581 (1972)	14
<i>Powell v. Bunn</i> , 185 Or App 334, 59 P3d 559 (2002), <i>review den</i> , 336 Or 60 (2003) (“ <i>Powell I</i> ”)	<i>passim</i>
<i>Powell v. Bunn</i> , 198 Or App 21, 108 P3d 37 (2005) (“ <i>Powell II</i> ”)	<i>passim</i>
<i>Prince v. Jacoby</i> , 303 F3d 1074 (9th Cir 2002), <i>cert den</i> , 540 US 813 (2003)	13
<i>Quinnipiac Council, Boy Scouts of America, Inc. v. Comm’n on Human Rights & Opportunities</i> , 204 Conn 287, 528 A2d 352 (1987)	11
<i>Randall v. Orange County Council, Boy Scouts of America</i> , 17 Cal 4th 736, 952 P2d 261 (1998)	11
<i>Roberts v. United States Jaycees</i> , 468 US 609, 104 S Ct 3244, 82 L Ed 2d 462 (1984)	4
<i>Rosenberger v. Rector & Visitors of University of Virginia</i> , 515 US 819, 115 S Ct 2510, 132 L Ed 2d 700 (1995)	12
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 US __, __ S Ct __, __ L Ed 2d __ (Mar 6, 2006) (No 04-1152)	11
<i>Salem College & Academy, Inc. v. Employment Division</i> , 298 Or 471, 695 P2d 25 (1985)	12
<i>Scalise v. Boy Scouts of America</i> , 265 Mich App 1, 692 NW2d 858, <i>leave to appeal den</i> , 473 Mich 853 (2005)	8, 10, 12, 14
<i>Schwenk v. Boy Scouts of America</i> , 275 Or 327, 551 P2d 465 (1976)	11
<i>Seabourn v. Coronado Area Council, Boy Scouts of America</i> , 257 Kan 178, 891 P2d 385 (1995)	11
<i>Sherman v. Community Consolidated School District 21</i> , No. 92 C 6674, 1993 WL 57522 (ND Ill Mar. 4, 1993), <i>aff’d</i> , 8 F3d 1160 (7th Cir 1993), <i>cert den</i> , 511 US 1110 (1994)	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>State v. Stoneman</i> , 323 Or 536, 920 P2d 535 (1996).....	12
<i>Welsh v. Boy Scouts of America</i> , 787 F Supp 1511 (ND Ill 1992), <i>aff'd</i> , 993 F2d 1267 (7th Cir 1993), <i>cert den</i> , 510 US 1012 (1993).....	11
<i>Welsh v. Boy Scouts of America</i> , 993 F2d 1267 (7th Cir), <i>cert den</i> , 510 US 1012 (1993).....	4
 CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES 	
US Const, Amend I.....	<i>passim</i>
US Const, Amend XIV	<i>passim</i>
ORS 659.850.....	<i>passim</i>
20 USC § 7905.....	2, 15
42 USC § 5309.....	2, 15, 16
36 USC § 30902.....	1
Pub L 109-148, § 8126, 119 Stat 2728-30 (2005)	15
<i>Equal Access to Public School Facilities for the Boy Scouts of America and Other Designated Youth Groups</i> , 69 Fed Reg 61556-62 (proposed Oct 19, 2004)	15

INTRODUCTION

The Court of Appeals' determination that there was substantial evidence that Portland Public School District discriminated against a student under ORS 659.850 by permitting Boy Scouts of America ("Boy Scouts" or "Scouting") to use school facilities on the same basis as other youth or community groups is factually and legally flawed.

ORS 659.850 prohibits an Oregon public school from discriminating on the basis of religion in any school program, service, or activity. Here, Portland Public School District allowed Boy Scouts to make brief, neutral presentations and distribute informational flyers — neither of which make any reference to religion or God — on the same terms as other similar groups. There can be no basis for concluding that, by doing so, the district discriminated against its students.

Boy Scouts is a nonprofit youth camping organization with over three million youth members and over one million adult volunteers nationwide. Congress chartered Scouting in 1916 as a "Patriotic and National Organization" to teach youth "to do things for themselves and others, . . . and to teach them patriotism, courage, self-reliance, and kindred virtues" 36 USC § 30902. Boy Scouts is an expressive association that, as one of several components of its expression, encourages its youth members to do their duty to God as determined by the member's parents or religious leaders, not by Boy Scouts. Scouting has no theology and is not a church.

Not only do brief presentations and flyers not violate ORS 659.850 but interpreting ORS 659.850 to prevent Scouting from enjoying the same access to school facilities that is provided to other membership organizations because of Scouting's expression would run afoul of two federal statutes and the First and Fourteenth Amendments to the United States

Constitution. See 20 USC § 7905; 42 USC § 5309; *Sherman v. Community Consolidated School District 21*, 8 F3d 1160 (7th Cir 1993), *cert den*, 511 US 1110 (1994).¹ Indeed, it is well established that the First Amendment requires that public schools provide equal access to even indisputably religious organizations for meeting, recruitment, and other purposes. There is no question that Boy Scouts is entitled to the same treatment. Accordingly, the Court of Appeals' decision should be reversed.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Whether a public school discriminates against its students under ORS 659.850 by permitting Boy Scouts to make brief, neutral presentations to students and otherwise use school facilities for recruitment purposes on the same basis as other youth and community groups.

Proposed Rule of Law

Providing community organizations access to school facilities and students for the purpose of making brief, neutral presentations and distributing informational material does not constitute discrimination by a public school in a school program, service, or activity under ORS 659.850. Furthermore, the First and Fourteenth Amendments to the United States Constitution require public schools to provide Boy Scouts with the same access to school facilities that is provided to other youth or community organizations.

¹ Such an interpretation of ORS 659.850 also would violate Article I, sections 2, 3, and 20, of the Oregon Constitution by treating the Boy Scouts differently from other organizations. This brief, however, focuses on First and Fourteenth Amendment precedents.

STATEMENT OF FACTS

The Boy Scouting Program

Boy Scouting, for boys aged 11 to 17, focuses on the outdoors and physical fitness. *Boy Scout Handbook* (2003). Scouting is fun with a purpose: Boy Scouts' mission is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law."

Patriotism and civic duty are central to Scouting. Every Scout promises in the Scout Oath and Law to do his duty to his country and to be loyal.² *Id.* The *Boy Scout Handbook* advises a Scout to "[e]xpress your loyalty to the United States by respecting the flag and government, and by participating in the democratic process." *Id.* at 48. The *Handbook* devotes an entire chapter to citizenship. *Id.* ch. 12 at 331-49. To attain the initial rank of Tenderfoot, the Scout must learn proper flag care, *id.* at 42-44, and an Eagle Scout must have earned three citizenship merit badges, including Citizenship in the Nation, *id.* at 180. Scouting emphasizes participatory citizenship through the Scout Slogan, "Do A Good Turn Daily," and Scouts routinely organize food drives and perform other community service.

The Scout Oath and Law also require that Scouts do their "duty to God" and be "reverent," but Scouting requires no sectarian affiliation or religious practices. Boy Scouts is absolutely nonsectarian and does not itself engage in sectarian proselytizing or religious instruction. Boy Scouts has no theology but instead encourages its youth members to look to

² The Scout Oath states: "On my honor I will do my best, to do my duty to God and my country, and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." The Scout Law provides that a Scout is "Trustworthy, Obedient, Loyal, Cheerful, Helpful, Thrifty, Friendly, Brave, Courteous, Clean, Kind and Reverent."

their parents and religious leaders for guidance on religious matters. *See Powell v. Bunn*, 185 Or App 334, 345, 59 P3d 559 (2002) (“*Powell I*”), *review den*, 336 Or 60 (2003).

Courts have described Boy Scouts as “one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs,” and have noted that “[t]hroughout its eighty-six years of existence, the Boy Scouts have successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people.” *Welsh v. Boy Scouts of America*, 993 F2d 1267, 1278 (7th Cir), *cert den*, 510 US 1012 (1993); *see Roberts v. United States Jaycees*, 468 US 609, 636 n*, 104 S Ct 3244, 82 L Ed 2d 462 (1984) (O’Connor, J., concurring) (*Boy Scout Handbook* is a “book about goodness”).

Boy Scout Recruiting

During the time at issue here, Portland Public School District’s policies permitted youth and community groups access to school facilities and students for recruiting purposes. *Powell I*, 185 Or App at 341-42; *see Powell v. Bunn*, 198 Or App 21, 26-27, 108 P3d 37 (2005) (“*Powell II*”). As explained by the Court of Appeals in *Powell I*, this “policy is not a special one for the Boy Scouts but, rather, is an evenhanded policy of access extended to a broad spectrum of community groups on neutral terms.” 185 Or App at 362. Boy Scouts was one of the organizations that made brief, neutral presentations to students during the lunch period and distributed informational flyers consistent with the policies. *Powell II*, 198 Or App 26-27; *Powell I*, 185 Or App at 343-45. Neither the presentations nor the flyers made any mention of religion. *Powell II*, 198 Or App at 59-60 (Landau, J., dissenting); *Powell I*, 185 Or App at 361.

Portland Public School District’s policies for access to school facilities have changed significantly in the many years since the events at issue here. For example, outside youth and community groups, including Boy Scouts, are no longer permitted to make presentations to students during lunch or other times during the school day. *See Board Policy*

3.30.035-P, Distribution of Materials and Information to Students in Schools by Non-School Groups and Recruitment of Students During School Hours;³ Administrative Directive 3.30.038-AD, Implementation of Board Policy 3.30.035-P Distribution of Information to and/or for Students by Non-School Groups.⁴

ARGUMENT

THE COURT OF APPEALS' INTERPRETATION OF ORS 659.850 IS FLAWED

ORS 659.850 prohibits discrimination “in” any public school “program,” “service,” or “activity.” The Court of Appeals interpreted this statute to conclude that Portland Public School District could discriminate against its students on the basis of religion by permitting brief, neutral presentations and literature distribution by Boy Scouts (and other youth and community organizations) because Boy Scouts requires those who ultimately agree to join the organization to do their best to do their duty to God.

This interpretation of the statute is plainly erroneous. Portland Public School District had opened its facilities to a wide range of community groups for recruiting purposes. Particularly where, as here, there is no dispute that the challenged activities made no reference whatsoever to religion, the conclusion that the school district engages in unlawful discrimination on the basis of religion simply because one of the groups that is provided access to the schools has a religious component to its private expression is untenable. In addition, because the First

³ Board Policy 3.30.035-P, Distribution of Materials and Information to Students in Schools by Non-School Groups and Recruitment of Students During School Hours, http://www.pps.k12.or.us/directives-c/pol-reg/3/30/3_30_035_P.pdf (last visited Feb. 17, 2006).

⁴ Administrative Directive 3.30.038-AD, Implementation of Board Policy 3.30.035-P Distribution of Information to and/or for Students by Non-School Groups, http://www.pps.k12.or.us/directives-c/pol-reg/3/30/038_AD.pdf (last visited Feb. 17, 2006).

and Fourteenth Amendments mandate that Boy Scouts have the same access to school facilities that other youth groups are allowed, ORS 659.850 cannot properly be interpreted to diminish the access Scouting has to public school facilities — compared with other youth groups — because of its view on duty to God and corresponding membership policies. Finally, were the Court of Appeals’ interpretation of ORS 659.850 to be adopted, every school district in Oregon would be in jeopardy of losing federal funding.

A. Allowing Boy Scouts Equal Access Does Not Constitute Discrimination

1. Nothing Even Arguably Religious Occurs at the Schools

Given the nature of the activities that occurred in the present case, it is difficult to see the basis for the Court of Appeals’ finding that there was substantial evidence that the *Portland Public School District* discriminated against its students on the basis of religion *in the provision of a school service, program, or activity*.

There is certainly no dispute that the school district did not treat any student differently on the basis of religion (or, for that matter, any basis at all) by allowing outside community groups, including Boy Scouts, to use school facilities for recruiting purposes. The recruiting presentations and informational flyers contained absolutely no religious message nor did they mention any membership requirements. As described by the Court of Appeals in *Powell I*:

A Boy Scouts representative addresses the students for a limited purpose: to make the organization’s existence known and to tell students (and their parents, via the students) how to learn more about the organization and join it. That is all. No religious message is conveyed; religion is not so much as mentioned. The students’ exposure to that limited message is brief, consisting of a five-minute announcement in the school cafeteria. Also, the students voluntarily may receive printed information (i.e., a flyer or a wristband) with meeting-place information to take home to their parents. That limited information is given to students once or, at most, twice in a full school year. Such brief, neutral activity that conveys no

religious message cannot sensibly be equated with governmental advancement of religious beliefs or principles.

185 Or App at 361; *see Powell II*, 198 Or App at 59-60 (Landau, J., dissenting). Just as the brief, neutral recruiting activity cannot be equated with government approval or endorsement of Boy Scouts' views or policies, it cannot, contrary to the Court of Appeals' view, be considered the equivalent of "the district itself offer[ing] the Scouting program" and, thus, discriminating in violation of ORS 659.850. *Powell II*, 198 Or App at 38.

The reasoning in *Sherman v. Community Consolidated School District 21*, No. 92 C 6674, 1993 WL 57522 (ND Ill Mar. 4, 1993), *aff'd*, 8 F3d 1160 (7th Cir 1993), *cert den*, 511 US 1110 (1994), is instructive. There, as here, the plaintiffs challenged a school district's policies permitting a Cub Scout Pack to use school facilities and distribute or post invitational flyers on school property. *Sherman*, 8 F3d at 1162. As here, the school district permitted youth and community groups to meet in school buildings and to distribute flyers to students and Cub Scouts was among the "[m]any religious and nonreligious youth organizations" that used school facilities for these purposes. *Id.* at 1163. The plaintiffs alleged that the school district violated the Establishment and Equal Protection Clauses by "endorsing the religious message of the BSA." *Id.* The district court observed that, as is the case here, "the practice challenged by plaintiffs is not overtly religious, involvement of school officials is minimal, and students are not directly or indirectly compelled to participate in any religious exercise." 1993 WL 57522 at *5. As in Portland, no religious message was contained in the information distributed to students. *Id.* The district court dismissed the complaint because "[t]here is nothing overtly (or even subtly) religious about a Cub Scout poster announcing a recruitment meeting." *Id.* at *6.

The Seventh Circuit affirmed the dismissal of the plaintiffs' claims. The court held that distribution of flyers and posting of literature were permissible because the school

“facilities were available to all youth organizations on the same terms and conditions.” 8 F3d at 1167. Cub Scouts was among the many organizations distributing and posting informational material that contained no overtly religious message. *Id.* at 1166-67. Accordingly, the court found that “there is not a direct association between the school and the BSA — only the school and multiple community organizations.” *Id.* at 1167. Put another way, the court concluded that “the BSA’s policy and action cannot be attributed to the school district” merely because Cub Scouts were one of the organizations allowed to use school facilities. *Id.* at 1167-68.⁵

Here, as in *Sherman*, nothing religious occurred at the schools. There can be no dispute that the presentations and other recruiting activities themselves were entirely neutral and made absolutely no mention of religion whatsoever. Nevertheless, the Court of Appeals majority apparently concluded that the nature of Scouting was too religious for the school district to allow Scouting to recruit on the same basis as other groups. Numerous other courts, however, have examined Scouting’s nonsectarian speech and secular activities and have concluded that Boy Scouts of America is not a religious organization. *See Scalise v. Boy Scouts of America*, 265 Mich App 1, 18, 692 NW2d 858, 871, *leave to appeal den*, 473 Mich 853 (2005) (“Boy Scouts is not primarily a religious organization.”); *see also Good News/Good Sports Club v. School District of the City of Ladue*, 859 F Supp 1239, 1248 (ED Mo 1993), *rev’d on other grounds*, 28

⁵ Similarly, in a case involving a Michigan statute which, like ORS 659.850, prohibits discrimination in the “services, activities, or programs provided by” a public school, the Michigan Court of Appeals rejected the argument that the school district violated the law by providing Boy Scouts with the same access to school facilities that was provided to other groups. *Scalise v. Boy Scouts of America*, 265 Mich App 1, 30-31, 692 NW2d 858, 878, *leave to appeal den*, 473 Mich 853 (2005). As in the present case, the school district there permitted community organizations, including Scouting, to distribute informational flyers to students and to make presentations to students inviting them to attend informational meetings. 265 Mich App at 4-5, 692 NW2d at 864-65.

F3d 1501 (8th Cir 1994), *cert den*, 515 US 1173 (1995) (Boy Scouts is “a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith”); *Good News Club v. Milford Central School*, 21 F Supp 2d 147, 160 (NDNY 1998), *aff’d*, 202 F2d 502 (2d Cir 2000), *rev’d on other grounds*, 533 US 98, 121 S Ct 2093, 150 L Ed 2d 151 (2001) (Scouting is “primarily secular in nature”).

Indeed, in *Powell I*, on facts that the Court of Appeals characterized as “essentially the same as the facts in this case,” *Powell II*, 198 Or App at 39, the court explicitly rejected the argument that Boy Scouts was a “religious organization.” *Powell I*, 185 Or App at 362. The *Powell I* Court carefully examined the nature of the Scouting program and concluded that, despite the “duty to God” requirement, “the record established that the bulk of Boy Scouts’ activities is secular (i.e., recreational and social).” *Id.* at 364. This conclusion is undoubtedly correct. As noted above, for nearly a century, Boy Scouts has fulfilled its mission of teaching the values of the Scout Oath and Law, among them patriotism, physical fitness, conservation, and reverence, to millions of American youth.

In any event, to the extent the majority below relied on what it perceived as Scouting’s religious nature to support its holding, it erred. The text of ORS 659.850 makes apparent that the focus must be on *the school district’s actions* in allowing Boy Scouts to recruit students on the same terms as other similar groups. In his dissenting opinion, Judge Landau correctly recognized that even respondents in this case concede that neither the school district itself nor the Boy Scouts engaged in any differential treatment of students – much less unreasonable differential treatment – as part of any school activity because nothing in the Boy Scout’s brief, neutral presentation to students contained any mention of religion. *Powell II*, 198 Or App at 63-64; *see also* ORS 659.850(1) (defining discrimination as an “act that unreasonably

differentiates treatment”). Moreover, as the Seventh Circuit held in similar circumstances, “the BSA’s policy and action cannot be attributed to the school district.” *Sherman*, 8 F3d at 1167-68; *see Powell I*, 185 Or App at 361-62; *Scalise*, 265 Mich App at 31, 692 NW2d at 878. Thus, because the school treated no students differently and nothing even remotely religious occurred on school grounds, the Superintendent properly concluded that there was not substantial evidence that the Portland Public School District violated ORS 659.850.

2. The Public Schools Do Not Discriminate Against Anyone by Opening School Facilities to a Wide Spectrum of Groups

Implicit in the Court of Appeals’ conclusion that, by allowing Boy Scouts the same access that is provided to other groups, the school district could be said to be “itself offer[ing] the Scouting program,” 198 Or App at 38, and, thus, discriminating in violation of ORS 659.850, is the fundamental misconception that Boy Scouts is a “discriminatory organization,” 198 Or App at 44-45. Boy Scouts is among the most diverse youth organizations in the country, involving boys of every race, creed, and economic circumstance. Through the Scout Oath and Law, Boy Scouts teaches boys to be helpful, friendly, courteous, and kind to all. In particular, Scouts are taught to respect those whose beliefs are different from their own. Labeling Scouting as “discriminatory” is inappropriate. *See Powell I*, 185 Or App at 345 (noting that the Boy Scouts does not “provide any sectarian instruction. Rather, it encourages the scouts’ personal spiritual growth by inviting them to explore their religious values with their parents and through any church, synagogue, or religious fellowship to which they belong. Any such exploration is voluntary.”).

Accepting the Court of Appeals’ interpretations of Scouting and ORS 659.850 would lead to absurd results. Portland Public School District provides Boy Scouts with the same access that is provided to numerous other community organizations, many of which also limit

their membership or services in some fashion. For example, the Girl Scouts could be said to “discriminate” on the basis of sex and the Special Olympics could be said to “discriminate” on the basis of disability. The conclusion that a school district does the same by allowing Girl Scouts or Special Olympics to make brief informational presentations or distribute flyers simply defies common sense. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 US __, __ S Ct __, __ L Ed 2d __ (Mar 6, 2006) (slip op at 19) (No 04-1152) (outsiders who come onto campus for the limited purpose of recruiting do not become part of the school’s expression).

In any event, no court in any jurisdiction has concluded that Boy Scouts’ membership policies constitute unlawful discrimination. To the contrary, numerous courts, including this Court in *Schwenk v. Boy Scouts of America*, 275 Or 327, 336, 551 P2d 465 (1976), have concluded that Boy Scouts’ membership policies do not violate nondiscrimination laws. *See Welsh v. Boy Scouts of America*, 787 F Supp 1511, 1541 (ND Ill 1992), *aff’d*, 993 F2d 1267 (7th Cir 1993), *cert den*, 510 US 1012 (1993); *Boy Scouts of America v. District of Columbia Comm’n on Human Rights*, 809 A2d 1192, 1193-94 (DC 2002); *Chicago Area Council of Boy Scouts of America v. City of Chicago Comm’n on Human Relations*, 322 Ill App 3d 17, 29, 748 NE2d 759 (2001), *dismissed in Richardson v. Chicago Area Council of Boy Scouts of America*, No. 92-E-80 (Chicago Comm’n on Human Relations Feb. 19, 2003); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal 4th 670, 673, 952 P2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal 4th 736, 738, 952 P2d 261 (1998); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan 178, 210-11, 891 P2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm’n on Human Rights & Opportunities*, 204 Conn 287, 302-03, 528 A2d 352 (1987). Indeed, Boy Scouts’ expressive

policies are protected by the First Amendment. *Boy Scouts of America v. Dale*, 530 US 640, 661, 120 S Ct 2446, 147 L Ed 2d 554 (2000).

No matter how one chooses to characterize Boy Scouts' policies, those policies are "not the state's. And that fact does not change merely because the state permits the Boy Scouts to use school facilities." *Sherman*, 1993 WL 57522, at *7; *see Powell I*, 185 Or App at 361-62; *Sherman*, 8 F3d at 1167-68; *Scalise*, 265 Mich App at 31, 692 NW2d at 878. Thus, there is nothing in the record to support the conclusion that the Portland Public School District discriminated against its students on the basis of religion by granting Boy Scouts the same access provided to other organizations to make brief, neutral presentations and distribute informational flyers. The Court of Appeals' conclusion to the contrary was incorrect as a matter of law.

B. Interpreting ORS 659.850 to Require the Exclusion of Boy Scouts Would Violate the Constitution

The Court of Appeals' interpretation of ORS 659.850 is also inconsistent with the basic principle of statutory construction that "a court will give a statute such an interpretation as will avoid constitutional invalidity." *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996) (citing *Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 481, 695 P2d 25 (1985)). Here, the Court of Appeals' interpretation of ORS 659.850 is clearly inconsistent with the First and Fourteenth Amendments.

In *Good News Club v. Milford Central School*, 533 US 98, 121 S Ct 2093, 150 L Ed 2d 151 (2001), the United States Supreme Court held that a school district committed viewpoint discrimination in violation of the First Amendment right of freedom of speech by refusing to allow a religious group, the Good News Club, to use school facilities on the same basis as other groups. Relying on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 US 819, 115 S Ct 2510, 132 L Ed 2d 700 (1995), and *Lamb's Chapel v. Center Moriches*

Union Free School District, 508 US 384, 113 S Ct 2141, 124 L Ed 2d 352 (1993), the Court stated that the First Amendment dictates that the government must not discriminate against speech on the basis of viewpoint. *Good News Club*, 533 US at 111. Because the school district provided a limited public forum open to “any group that promotes the moral and character development of children,” *id.* at 108, it could not exclude the Good News Club merely because the Club taught morals “from a Christian perspective,” *id.* at 111.

This principle has been applied repeatedly to require school districts to provide groups having religious viewpoints with equal access to meeting space. *See, e.g., Donovan v. Punxsutawney School Board*, 336 F3d 211, 225-26 (3d Cir 2003); *Bronx Household of Faith v. Board of Education*, 331 F3d 342, 353-55 (2d Cir 2003); *Prince v. Jacoby*, 303 F3d 1074, 1090-92 (9th Cir 2002), *cert den*, 540 US 813 (2003). Similarly, the refusal of school districts to provide religious groups with access to recruitment forums has been held to violate the First Amendment. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F3d 514, 526-30 (3d Cir 2004); *Child Evangelism Fellowship of Maryland, Inc v. Montgomery County Public Schools*, 373 F3d 589, 593-94 (4th Cir 2004); *Hills v. Scottsdale Unified School District*, 329 F3d 1044, 1049-53 (9th Cir 2003), *cert den*, 540 US 1149 (2004); *Prince*, 303 F3d at 1090-92.

Thus, the First Amendment requires that Boy Scouts be provided with equal access to school facilities for recruiting purposes. Indeed, Boy Scouts and another local council won a preliminary injunction against a school district for this very reason. *Boy Scouts of America v. Till*, 136 F Supp 2d 1295 (SD Fla 2001) (granting injunction requiring school district to continue to allow Boy Scouts access to school facilities on the same basis as other community

organizations because unequal access would violate Boy Scouts' First Amendment rights); *see also Scalise*, 265 Mich App at 15, 692 NW2d at 870.

The result would be the same under the Equal Protection Clause of the Fourteenth Amendment: the school district may not grant Boy Scouts access inferior to other youth and community groups based on its expression. *See generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S Ct 3249, 87 L Ed 2d 313 (1985); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S Ct 2717, 33 L Ed 2d 570 (1972) (government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech”).

Interpreting ORS 659.850 to require that public schools deny Boy Scouts the same access that is provided to other groups because of Boy Scouts' values and corresponding expressive policies would render the statute unconstitutional. Accordingly, in keeping with well-established maxims of statutory construction, this interpretation of ORS 659.850 should be rejected.

C. Portland Public School District Must Provide Equal Access to Boy Scouts on Pain of Losing Federal Funding

In addition to the constitutional problems that would be created by adopting the Court of Appeals' interpretation of ORS 659.850, two federal statutes explicitly require Portland Public School District to provide Boy Scouts with the same access to its facilities that it provides to other youth and community groups on pain of losing federal funding.

The first statute, the Boy Scouts of America Equal Access Act, provides that “[n]otwithstanding any other provision of law,” no public school that receives federal funds “shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America” for any reason, specifically including

“reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America.” 20 USC § 7905(b)(1); *see Myers v. Loudoun County School Board*, 251 F Supp 2d 1262, 1276-77 (ED Va 2003) (relying on Boy Scouts of America Equal Access Act to reject Establishment Clause challenge to Boy Scouts’ use of school facilities for recruiting purposes), *aff’d*, 418 F3d 395 (4th Cir 2005). Failure to comply with the Boy Scouts of America Equal Access Act will result in the withdrawal of any federal funds made available by the Department of Education. 20 USC § 7905(c)(2).

The Court of Appeals remarked in passing that it did not believe that the Boy Scouts of America Equal Access Act applies because it only covers the ability of Boy Scouts to “conduct meetings before or after the hours when attendance is compulsory.” *Powell II*, 198 Or App at 39 n 9. The Court of Appeals was mistaken. Indeed, the United States Department of Education has issued proposed regulations expected to be finalized soon which make clear that the Boy Scouts of America Equal Access Act applies not only to meeting space but also to forums for recruitment, whether before, during, or after school hours. *See Equal Access to Public School Facilities for the Boy Scouts of America and Other Designated Youth Groups*, 69 Fed Reg 61556-62 (proposed Oct 19, 2004) (to be codified at 34 CFR pt 108). The proposed regulations also explicitly state that the requirements are “not obviated or alleviated by any State or local law or other requirement.” *Id.* at 61562.

The second federal statute implicated by the Court of Appeals’ interpretation of ORS 659.850 is the Support Our Scouts Act of 2005, Pub L 109-148, § 8126, 119 Stat 2728-30 (2005), which amended 42 USC § 5309 to mandate that no State or unit of local government that receives federal community development funds “shall deny equal access or a fair opportunity to meet to, or discriminate against, any youth organization, including the Boy Scouts of America or

any group officially affiliated with the Boy Scouts of America, that wishes to conduct a meeting or otherwise participate in that designated open forum, limited public forum, or nonpublic forum,” on pain of losing federal funding. 42 USC § 5309(e)(2). Thus, failure to comply with this requirement can, among other things, result in the termination of federal community development funding made available by the Department of Housing and Urban Development. *Id.* at § 5309(b).

Adoption of the Court of Appeals’ erroneous interpretation of ORS 659.850 would not only bring that statute into conflict with the First and Fourteenth Amendments but would also put every school district in Oregon in jeopardy of losing federal funding.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Dated: March 7, 2006

Respectfully submitted,

Thomas V. Dulcich #80210
Sara Kobak #02349
SCHWABE WILLIAMSON & WYATT P.C.
Pacwest Center, Suites 1600-1800
1211 Southwest Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-9981

Timothy R. Volpert #81407
P. Andrew McStay, Jr. #03399
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, Oregon 97201-5630
Telephone: (503) 241-2300

George A. Davidson (admission *pro hac vice*
pending)
Carla A. Kerr (admission *pro hac vice* pending)
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Attorneys for *Amicus Curiae* Boy Scouts of
America