

No. 05-3451

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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EUGENE WINKLER, et al.,

Plaintiffs-Appellees,

v.

DONALD H. RUMSFELD,

Defendant-Appellant.

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On Appeal from the United States District Court  
for the Northern District of Illinois

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## **INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Defendant-Appellant. Amicus has received consent from counsel for both sides.

Founded in 1973, Pacific Legal Foundation is a nonprofit public interest law foundation supported primarily by voluntary private donations from thousands of citizens from coast to coast. PLF litigates for limited government, private property rights, individual freedom, and free enterprise. Headquartered in Sacramento, California, PLF also has offices in Coral Gables, Florida; Honolulu, Hawaii; and Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has an interest in this case because the issues could prove relevant to litigation, now pending before the California Supreme Court, in which PLF attorneys are among the counsel of record. Specifically, PLF attorneys represent one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (2002), review granted by 65 P.3d 402 (Cal. 2003). Tonatiuh Alvarez, the Petitioner represented by PLF attorneys, is challenging the City of Berkeley's exclusion of the Berkeley Sea Scouts from a city program that offers nonprofit organizations free use of the city marina. Berkeley excludes the Sea Scouts from the program explicitly because of the Sea Scouts' organizational affiliation with the Boy Scouts of America, and the city's contention that the Boy Scouts' principles run afoul of local antidiscrimination

provisions. Tonatiuh Alvarez and other Petitioners (all of whom are members of the Berkeley Sea Scouts) argue, among other things, that the city has violated their First Amendment associational rights and their right to Equal Protection of the laws. Because the present case deals with objections to the use of public property by the Boy Scouts, the ruling could yield language that the California Supreme Court might find applicable to *Evans*.

PLF attorneys have a tradition of litigating the meaning and scope of the First Amendment. PLF attorneys represented the petitioner in *Keller v. State Bar of California*, 496 U.S. 1 (1990) and plaintiffs in *Brosterhous v. State Bar of California*, 12 Cal. 4th 315, 906 P.2d 1242 (Cal. 1995). PLF has participated as a friend of the court in a number of First Amendment cases before federal courts. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 645 (2003); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); and *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990).

PLF also has supported the Boy Scouts' constitutional rights in a number of contexts. PLF submitted friend of the court briefs in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003);

*Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.C. 2002).

PLF attorneys have also recently appeared before this Court, representing appellant in *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), and PLF has appeared as amicus in a number of cases, including *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003); *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999 (7th Cir. 2003); *Citizens for a Better Environment v. The Steel Company*, 230 F.3d 923 (7th Cir. 2000); *Van Zelst v. C.I.R.* 100 F.3d 1259 (7th Cir. 1996); and *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A.* 999 F.2d 256 (7th Cir. 1993).

PLF believes that its public policy perspective and litigation experience in constitutional law will aid this Court in resolution of this case.

### **SUMMARY OF ARGUMENT**

The court below would void the statute authorizing Defense Department support of the Boy Scout Jamboree based on an unsupportable Establishment Clause rationale. The Jamboree is not a religious institution, but rather a civic and patriotic celebration open to the general public. Military support is designed exclusively to advance the Armed Services' own secular purposes, such as training and public relations.

The reasonable observer, whose perspective is the touchstone of Establishment Clause analysis, would not perceive any government “endorsement” of religion in this support, and not merely because the Jamboree is a secular proceeding. The military offers logistical or other forms of assistance—to further military training and public outreach goals—for a broad spectrum of private undertakings. The pattern of assistance to private organizations transmits no message of religious promotion.

Upholding the decision below would undermine a beloved institution, the Jamboree, that has offered opportunities for outdoor activity, skills development, friendship building, and fun, for generations of Boy Scouts and hundreds of thousands of members of the general public. This would be a high price to pay for “affirming” Establishment Clause values where they have not been violated.

## **ARGUMENT**

### **I**

#### **THE REASONABLE OBSERVER WOULD PERCEIVE NO “ENDORSEMENT” OF RELIGION IN THE MILITARY’S ASSISTANCE TO THE BOY SCOUT JAMBOREE**

The district court asserts that “the aid provided by the Jamboree statute violates the Establishment Clause.” *Winkler v. Chicago School Reform Bd. of Trustees*, 2005 WL 627966, at \*22 (N.D. Ill. 2005). The court contends that the Jamboree statute founders on the second question asked by the Establishment Clause test enunciated in

*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971): Whether the military’s support for the Jamboree has the “primary effect” of advancing religion. *Winkler*, 2005 WL 627966, at \*21-\*22.

Defendant-Appellant has persuasively answered the contention that a religion-advancing effect can be found, under the test of *Agostini v. Felton*, 521 U.S. 203, 233 (1997), which seeks evidence of religious coercion, defining aid by reference to religion, or entanglement with religion (a factor not asserted in this case). Amicus will focus on the alternative, “endorsement” test for applying *Lemon*’s second prong. Under this test, too, no impermissible “advancement of religion” can be found.

This analysis asks whether government action “conveys a message of endorsement or disapproval [of religion].” *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring). First articulated in Justice O’Connor’s *Lynch* concurrence, the “endorsement” test was officially adopted by the Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989).

In this approach, context is all-important. The challenged government action “must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)).

Common sense is also essential. The perspective of a “reasonable observer” is what counts, and that perspective must be informed by “the history and context of the community and forum in which the religious display appears.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring).

Applying these analytical tools, the Court upheld a city’s placement of a creche in a Christmas display located in a private park within the downtown shopping district. The creche was surrounded by Christmas trees, a Santa Claus, reindeer, and other secular figures—a milieu ensuring that a reasonable observer would not perceive religious endorsement. *Lynch*, 465 U.S. at 687.

Likewise, in *Books v. Elkhart County Indiana*, 401 F.3d 857 (7th Cir. 2005), this Court considered a display in a county administration building of the Ten Commandments, among nine other historical documents, all flanked by the flags of Indiana and the United States. *Id.* at 858-59. This Court noted that the effect of a challenged action must be “evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended.” *Id.* at 867. The court faulted the district court for “circumscrib[ing] its focus and consider[ing] the Ten Commandments in isolation from the other documents.” *Id.* at 864. The “content and context” of the display, considered as a whole, did not “suggest that the Ten Commandments [were] included . . . for their singular religious import.” *Id.* at 868.

Bearing in mind these guidelines—that the “big picture,” as it were, is the proper perspective of the “reasonable observer”—the Jamboree cannot be seen as offending the Establishment Clause, because context shows that it is not religious, that the military support has a clearly secular intent and purpose, and that the pattern of military assistance to other private ventures and organizations reveals, collectively, a commitment to neutrality and no religious endorsement.

**A. The Reasonable Observer Would Recognize  
That the Jamboree Is Not a Religious Institution**

The military assistance sanctioned by the Jamboree statute does not go to the Boy Scouts of America as an organization but rather to the Jamboree, a patriotic and civic enterprise. *See* 10 U.S.C. § 2554(g), (b) (“In the case of a Boy Scout Jamboree held on a military installation, the Secretary of Defense may provide personnel services and logistical support at the military installation. . . .”). The reasonable observer would recognize that the Jamboree is a secular institution. Although religious services are available, they are offered on a voluntary basis as an accommodation to Jamboree participants who desire them. Appellant’s Separate Appendix (SA) at 34, 60. Likewise, at the 2001 Jamboree, scouts were allowed to earn a “Duty to God” patch, but this, too was left to the voluntary choice of individual scouts. *Id.* at 37, 61. The institutional theme of the Jamboree (the broad context against which all its

elements should be viewed, pursuant to *Lynch*, 465 U.S. at 680), is a focus on *secular* pursuits: activities promoting “physical fitness, conservation, ecology, and the universal spirit of brotherhood.” SA at 59. The event is open to the general public, with no religious test applied. Tens of thousands of visitors attend, along with traditional visits from members of Congress and the President of the United States. *Id.* at 72.

In sum, the “big picture” of the Jamboree reveals values and activities that are inclusive and secular—“patriotism, courage, self-reliance, community service, leadership, teamwork, the spirit of brotherhood, physical fitness, love of the outdoors.” SA at 73. Because the reasonable person, viewing this big picture, would acknowledge the Jamboree as a secular institution, the same observer would not see military support as “endorsing” religion.

**B. The Reasonable Observer Would Recognize That Military Support for the Jamboree Has an Exclusively Secular Purpose**

The “reasonable observer” is aware of the context and history of the Jamboree and the nature and motives of government support.<sup>1</sup>

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<sup>1</sup> Plaintiffs ask the Court to adopt what has been called a “heckler’s veto,” an “ignoramus’s veto,” or an “obtuse observer” standard. *See Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2324 (2004) (O’Connor, J., concurring), *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc), and *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring), respectively.

Defense Department policy requires that all funds spent in support of the Jamboree must have a military benefit; no funds may be spent on commercial items or services that solely benefit the Boy Scouts. SA at 72. Indeed, the military's assistance to the Jamboree consists exclusively of in-kind support, such as the cost of billeting and transporting troops to the event (SA at 71)<sup>2</sup>, and all support is intended for secular purposes:

1) *Recruitment and public relations*: Military performing units, exhibits, displays and activity areas serve the recruitment-related objective of promoting the military to a large gathering of America's youth and showcasing the careers that the military offers (SA at 73; *see id.* at 74).

2) *Training*: Construction, maintenance and disassembly of a "tent city" capable of supporting tens of thousands of Boy Scouts and many tens of thousands more visitors for over a week provides important training opportunities for military personnel. SA at 74-75.

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<sup>2</sup> As noted, the Jamboree is secular, but even if it weren't, the Supreme Court has upheld in-kind support even for unquestionably sectarian organizations because in-kind support does not raise the same concerns as cash grants. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemptions for churches). Even if the Jamboree were religious, there would be no basis for invalidating in-kind support under the Establishment Clause.

3) *Maintenance and improvements of the site*: Various improvements to Fort A.P. Hill—*e.g.*, road construction, replacement of wells and sewer lines, erection of showers and latrines, along with construction of facilities, such as obstacle courses, that are used both for Jamboree activities and military training—provide a lasting military benefit to the installation. SA at 75-76.

The reasonable observer would be aware that these *secular* factors are the goals and results of military assistance for the Jamboree, so the assistance has a primarily—indeed, exclusively—secular character.

This observation of the “reasonable observer” finds support in case law. There is no precedent finding in-kind services to an essentially nonreligious event, such as the Jamboree, to be an Establishment Clause violation, even when there is an arguably religious element in the content of the event. *See Clergy and Laity Concerned v. Chicago Board of Education*, 586 F. Supp. 1408, 1412 (N.D. Ill. 1984) (no Establishment Clause violation because clergy antiwar activists’ proposed presentations at schools were not religious); *Fausto v. Diamond*, 589 F. Supp. 451, 468 (D.R.I. 1984) (The display of a memorial to the “Unknown Child” on municipal property in front of a church did not violate the Establishment Clause because the monument “in no way benefits or advances either religion in general or any given creed.”).

Moreover, given the de minimis nature of the religious element at the Jamboree, a reasonable observer would recognize that any benefit that military support for the Jamboree has to the religious component of scouting, would be at most indirect and incidental to the military's secular purpose in providing the support.

Here, too, case law supports the reasonable observer. In *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000), this Court considered a challenge to an Indiana statute authorizing state employees to take Good Friday as a paid holiday. The day was chosen simply as a convenient day for a spring vacation. The court noted that “No court has ever held that the Establishment Clause is violated merely because a state holiday has the indirect effect of making it is easier for people to practice their faith.” *Bridenbaugh*, 185 F.3d at 801-02.

The Jamboree is not 100% religion-free. But the religious element, such as voluntary church services, is so peripheral to the main theme of the event; the military aid is so plainly directed for military secular purposes; and any benefit to religious expression would be so clearly an incidental, indirect consequence of secularly oriented support, that the reasonable observer—and the weight of case law —would not find the Establishment Clause violated.

**C. The Reasonable Observer Would Recognize That the Military Offers Assistance to a Broad Range of NonPublic Ventures, Not Just the Jamboree, and That Collectively These Relationships Transmit a Message of Neutrality, Not Religious “Endorsement”**

The “context” in which the reasonable observer would view military support for the Jamboree is the spectrum of relationships maintained with private organizations, all for the purpose of promoting the military’s indisputably secular goals of outreach, training and the like. Pursuant to Defense Department policy or statutory authority, the military provides support services for such nonmilitary organizations as the Special Olympics, the Goodwill Games and other sporting events, and various youth and charitable organizations. SA at 66, 83.

It was legal error for the court below to focus exclusively on the Jamboree in determining whether military support for the Jamboree violates the Establishment Clause. Even if the Jamboree were a religious undertaking—which it is not—Establishment Clause principles require analyzing it in a larger context, *i.e.*, against the background of the full range of relationships that the military enters into with nonpublic organizations, to see whether, collectively, that constellation of relationships betrays a religious endorsement. Evaluated by this “objective, reasonable person standard” (*Books*, 401 F.3d at 867), the military’s assistance to the Jamboree fits into a neutral tapestry of relations with a broad variety of private organizations, a pattern that does

not have the effect of promoting religion because it projects a message of neutrality, not religious endorsement.

Ironically, the effect of the ruling below would be to make ideology trump neutrality in a constitutionally suspect way. Viewpoint-related factors would be smuggled into the process of determining what private organizations should receive in-kind military support. Currently, the *military's own secular mission*, including its needs for outreach and training, determines military support for the Jamboree and other private organizations. SA at 72-75. But the effect of barring military support for the Jamboree —*if done on viewpoint-related grounds, i.e., because of religious speech that is alleged (albeit incorrectly) to be propounded by the Jamboree*—would be to substitute an ideological litmus test for a military-needs test. This would be in tension, to put it mildly, with the line of Supreme Court First Amendment rulings that demand viewpoint neutrality in the way government provides forums, assistance, or other facilitation for private organizations; viewpoint neutrality means even-handedness toward all secular and religious viewpoints. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). *See also, DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001) (denial of Village Hall for National Day of Prayer

function was unconstitutional viewpoint discrimination).

**D. The Reasonable Person Would Recognize That the Military’s Support for the Jamboree Is Not “Aid” At All, but Rather a Value-for-Value Contract**

Even if one were to grant, for the sake of argument, that the Jamboree is a religious venture—a claim the reasonable observer would reject—the Supreme Court has upheld numerous government contractual arrangements with religious organizations where the purpose is to promote public service or “social welfare” goals. *Bowen v. Kendrick*, 487 U.S. 589, 609 n. 4 (1988) (Establishment Clause did not bar grants to organizations, including religious ones, to promote abstinence).

This case, however, is simpler still, because it does not involve a grant or any kind of direct benefit being given to the Jamboree (or the Boy Scouts), but rather a marketplace transaction in which each side receives something of value. The Boy Scouts have funded substantial upgrades at Fort A.P. Hill in whole or in part. Since the Jamboree was first sited there in 1981, the Scouts have invested an estimated \$5.6 million in improvements to the installation, pursuant to a 20-year signed understanding with the Army. SA at 41, 77. The agreement requires the Scouts to make permanent improvements at Fort A.P. Hill in exchange for priority use of those facilities for 10 days every 4 years. *Id.* at 41.

Considering the significant cost associated with these requirements, common sense—*i.e.*, a reasonable observer—would recognize this arrangement not as a “grant” or “appropriation” or even “aid” to the Scouts or the Jamboree, but as a value-for-value transaction in which the military is benefitted at least as much as the Scouts and the Jamboree.

**E. The Reasonable Observer Would Not Mistake the Military’s Message for the Jamboree’s Speech or the Scouts’ Speech**

Because of the broad array of private organizations that the military supports, and the clear military purposes for which that support is offered—and the overarching message of neutrality with regards to those organizations’ particular and individual beliefs—the reasonable observer would not project the message of the Jamboree, or the speech of the Boy Scouts, onto the military. “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). The in-kind assistance to the Jamboree is so clearly for the military’s own military purposes, that—even if the Jamboree’s message were religious, which it is not—the reasonable observer would not interpret that message as a government message.

## II

### **THE REASONABLE OBSERVER WOULD RECOGNIZE THAT THE BOY SCOUTS IS NOT AN ORGANIZATION SUBJECT TO THE ESTABLISHMENT CLAUSE**

#### **A. Courts Across the Country Have Affirmed the Commonsense Understanding That the Boy Scouts is Not a “Religion”**

The recipient of the military assistance at issue is not the Boy Scouts of America, but the Jamboree, a public, civic, patriotic event held for 10 days at four-year intervals. But even if the Boy Scouts of America as an organization were the recipient, Establishment Clause analysis would not be appropriate, because the Boy Scouts of America is not a religion. The reasonable observer, whose perception is assumed to include the historical and cultural context of the matter at hand, would recognize this fact.

Membership in the Scouts is nonsectarian; there is no Scout theology or shared faith in religious tenets. SA at 34. Therefore, courts across the country have recognized a commonsense distinction between the Scouts and “religion” as traditionally understood. The Scouts have typically been recognized as “voluntary youth service organization” comparable to the “YMCA, YWCA, Girl Scouts [and]

Camp Fire Girls” (*see, e.g., Jeldness v. Pearce*, 30 F.3d 1220, 1226 (9th Cir. 1994) (citing 45 C.F.R. §§ 86.12-86.14))—as opposed to a religious belief system.

The Boy Scouts is undeniably an expressive organization with a core set of principles enjoying First Amendment Protection (*see Boy Scouts of America v. Dale*, 530 U.S. at 656)—and their expressive beliefs include a religious component, in that members “express a belief in God” (*see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1269 (7th Cir. 1993)). However, the Scouts “espouse nondenominational, nonsectarian philosophical goals,” in the manner of “the Daughters of the American Revolution, et cetera,” and are not a “recognized religious organization . . . affiliated with a specific, identifiable religion.” *Lindenberg v. United States Dep’t of Justice, I.N.S.*, 657 F. Supp. 154, 158 (D.D.C. 1987).

In explicitly rejecting a contention that the Boy Scouts is a religious organization for Establishment Clause purposes, the Court of Appeals of Oregon noted,

But a scout’s religious beliefs—both their strength and their substance—are left to him and his family; any exploration of them is done individually and voluntarily. Beyond that, the record establishes that the bulk of Boy Scouts’ activities is *secular* (*i.e.*, recreational and social).

*Powell v. Bunn*, 59 P.3d 559, 580 (Or. Ct. App. 2002) (emphasis added) petition granted. *See also Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 871 (Mich. Ct. App. 2005) (“Boy Scouts is not primarily a religious organization”), *appeal denied*, 700 N.W.2d 360 (Mich. 2005).

Although this circuit employed Establishment Clause analysis when it rejected a challenge to Boy Scout use of school facilities (*Sherman v. Community Consol. School Dist. 21 of Wheeling Township*, 8 F.3d 1160 (7th Cir. 1993)), it did so without addressing the threshold question of whether the Scouts are indeed a “religion” to which the First Amendment’s religion clauses must apply. Indeed, it is common for courts—including this circuit—to clearly distinguish the Boy Scouts from formally religious organizations. *See, e.g., Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501, 1505 (8th Cir. 1994) (citing the unpublished district court ruling in the case) (in contrast with the explicitly Christian-based Good News/Good Sports Club, “[t]he Scouts . . . are a *secular* organization”) (emphasis added); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1166 (7th Cir. 1993) (While “groups such as the Boy Scouts” had given talks at the public schools in question, “the record is barren of addresses . . . by political groups *or religious organizations* other than the Gideons.”) (emphasis added); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1115 (7th Cir. 1986) (While the school had hosted a meeting for the Boy Scouts, “no *religious . . . group*,” other than the plaintiff—a teacher who led a Bible study—“had ever tried to hold a meeting” at the school.) (emphasis added).

In vindicating the Scouts’ freedom to choose their own membership policies, the United States Supreme Court invoked the right of expressive association; no mention

was made of the First Amendment’s Free Exercise Clause—an omission that would be curious if the Court viewed scouting as a religion. *Boy Scouts of America v. Dale*, 530 U.S. 640.

“A simple requirement that members believe in God would not alone make an organization religious.” Kent Greenawalt, *Religion As a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 768 (1984). The Third Circuit has developed a test that reflects this sensible observation. In *Africa v. Pennsylvania*, the court stressed “comprehensiveness” as a salient feature of religion—*i.e.*, for an organization to trigger the Constitution’s religion clauses, it should hold beliefs about “ultimate and comprehensive ‘truth.’” 662 F.2d 1025, 1035 (3d Cir. 1981), *citing Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring)). Thus, The Science of Creative Intelligence is a religion “in part because of its comprehensive nature: its teachings consciously aimed at providing the answers to ‘questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness.’” *Id.* (citation omitted).

Because the Boy Scouts is nonsectarian—so that its members, while professing belief in God, may define God according to varied and even conflicting creeds, or by no creed at all—it is simply not reasonable to suggest that the Boy Scouts offers a “comprehensive” belief system laying claim to “ultimate truth” in the sense of a

specific spiritual path or catechism that promises the way to “unlimited happiness.” The Boy Scouts offers an interfaith, common-denominator acknowledgment of a deity. Of that deity’s nature and detailed, *comprehensive* spiritual demands, the Boy Scouts offers no teaching. To the contrary, the Boy Scouts leaves exploration of those questions—defined spiritual beliefs and paths to “ultimate truth”—up to each Scout “and his family; any exploration of them is done individually and voluntarily.” *Powell*, 59 P.3d at 580.

Therefore, the reasonable observer would recognize that the Scouts is not a religion, and government interaction with the Scouts does not implicate the Establishment Clause.

**B. A Variety of Private Expressive Organizations  
Could Face Difficulties If the Courts Took a Cavalier  
Approach to Extending the Reach of the Establishment Clause**

Although Boy Scout speech should not be at issue in this case, because the assistance is provided to the Jamboree, not the Scouts, it should be noted that to categorize the Boy Scouts as a “religion” subject to the Establishment Clause could have far-reaching negative impacts beyond this litigation. Such a designation could force Scouts and Scout-affiliated individuals and organizations (such as, potentially, the Sea Scouts in *Evans, supra*, one of whom is represented by Amicus), to confront litigation and run an Establishment Clause gauntlet anytime and anywhere they sought

equal footing in government-sponsored forums or programs.

Other expressive organizations with unifying philosophies—but, like the Scouts, with no shared understanding of religious questions, and, in fact, with members all over the map on such issues—could be arbitrarily corralled into the category of “religion” and face Establishment Clause objections to their participation in the public square.

Extending the status of “religion” to private associations that are not creedal faith organizations clearly carries dangers. “Attempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task.” *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996). Few tasks require “more circumspection.” *Id.* (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982)). Among the dangers in a cavalier expansion of the reach of the Establishment Clause: “‘[I]f anything can be religion, then anything the government does can be construed as favoring one religion over another, and . . . the government is paralyzed . . . .’” *Alvarado*, 94 F.3d at 1230 (citing Donovan, James M., *God is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 Seton Hall Const. L.J. 23, 70 (1995)).

As noted in II-A herein, courts across the country have recognized that the Boy Scouts is not a religion. This case should not be a vehicle for even considering a departure from that judicial consensus.

**CONCLUSION**

For the foregoing reasons, Amicus respectfully asks that the judgment of the district court insofar as it grants relief to Plaintiffs be reversed and summary judgment dismissing the complaint should be granted for the federal defendants.

DATED: November 9, 2005.

Respectfully submitted,

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By \_\_\_\_\_  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 4,742 words.

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JOHN H. FINDLEY

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT was filed with the Clerk this 9th day of November, 2005, via first-class mail, postage prepaid. I further certify that two copies of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT were served this day via the same upon each of the following:

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