R. ALEXANDER ACOSTA
Assistant Attorney General

CAROL C. LAM
United States Attorney
Southern District of California

J. MICHAEL WIGGINS
Deputy Associate Attorney General

SHELDON T. BRADSHAW
DAVID K. FLYNN
ERIC W. TREENE
JENNIFER LEVIN
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, MJB 3336
Washington, D.C. 20035
(202) 353-8622

Attorneys for Amicus Curiae
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LORI & LYNN BARNES-WALLACE; MITCHELL BARNES-WALLACE; MICHAEL & VALERIE BREEN; and MAXWELL BREEN, Plaintiffs, v. BOY SCOUTS OF AMERICA; CITY OF SAN DIEGO; and BOY SCOUTS OF AMERICA - DESERT PACIFIC COUNCIL, Defendants.	Case No. 00CV1726 J (AJB) **UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES AS AMICUS CURIAE IN SUPPORT OF PARTIAL SUMMARY JUDGMENT FOR THE BOY SCOUTS OF AMERICA AND DESERT PACIFIC COUNCIL, BOY SCOUTS OF AMERICA** Date: April 5, 2004 Time: 10:30 a.m. Courtroom 12 Hon. Napoleon A. Jones, Jr.

The United States submits this Memorandum of Points and Authorities in support of defendants Boy Scouts of America's and the Boy Scouts of America - Desert Pacific Council's Further Motion For Summary Judgment. Based on the current record, summary judgment on the federal Establishment Clause and Equal Protection claims regarding the City of San Diego's lease with the Boy Scouts for Fiesta Island should be awarded in favor of the Boy Scouts.

PROCEDURAL HISTORY

Plaintiffs filed this action against the City of San Diego and against the Boy Scouts of America and its affiliate the Boy Scouts of America - Desert Pacific Council (collectively, "Boy Scouts") concerning the City's two long-term leases with the Boy Scouts for public park land in Balboa Park and Fiesta Island, in Mission Bay Park. At Fiesta Island, the Boy Scouts constructed the San Diego Youth Aquatic Center (Aquatic Center), which is available for groups serving youths ages 8-18. The leases require the Boy Scouts to make substantial improvements and maintain the properties, and establish a procedure for access and use by the public. The Boy Scouts also may reserve use of these facilities for its own activities. Plaintiffs, who are a lesbian couple, an agnostic couple, and their scouting-age sons, allege that the City, through the leases and the Boy Scouts' operation of these facilities, have violated, *inter alia*, the First and Fourteenth Amendments of the federal Constitution. U.S. Const., Amend. I, XIV.

On July 31, 2003, this Court granted in part and denied in part plaintiffs' motion for summary judgment. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). This Court granted summary judgment on plaintiffs' claim that the Balboa Park lease violates the federal Establishment Clause, *id*. at 1276, and on related state constitutional claims. *Id*. at 1278-1280. This Court denied summary judgment on the federal Establishment Clause and related state claims involving the Fiesta Island lease because the record did not contain sufficient evidence regarding how the lease was negotiated. *Id*. at 1276, 1279, 1280. It also denied summary judgment as to the Fourteenth Amendment Equal Protection Clause claims concerning both leases. *Id*. at 1285, 1288.

On February 9, 2004, the Boy Scouts filed a Further Motion For Summary Judgment and accompanying materials. These filings address the claims regarding the Fiesta Island lease, in part, by

responding to the Court's call for additional evidence regarding the negotiations for this lease. A hearing on the Boy Scouts' motion currently is scheduled for April 5, 2004.

STATEMENT OF FACTS

The City of San Diego leases property to a diverse array of more than 100 nonprofit organizations to provide for the "cultural, educational, and recreational enrichment of the citizens of the City." Rothans Decl. ¶¶ 2, 6, 19 [DE 142].[1/] These leases typically are for little or no rent in return for the Lessee's maintenance of the property and the provision of community services. *Id*. at ¶ ¶ 10-11, 19 [DE 142]. Many of the leases also involve parklands, under which the City benefits by saving development, maintenance, and operational costs.[2/] For example, in 2002, the City spent over six million dollars to maintain other parklands in Mission Bay and Balboa Park, but, given the terms of its lease with the Boy Scouts, spent nothing to maintain the portion of parkland at issue here. Griffith Decl. ¶ 9 [DE 141].

More than 40 organizations that serve youth in the San Diego area formed the Fiesta Island Youth Facility Committee (Youth Committee) to develop a proposal to construct a youth aquatic center at Fiesta Island. Ward Decl. ¶ 6 [DE 239]; Day Decl. ¶ 8 [DE 240]. The Youth Committee proposed to the City of San Diego that the Boy Scouts, a Youth Committee member, provide the funding for construction and maintenance of the facilities, and have responsibility for operations. The Youth Committee proposed one entity for purposes of the lease and operations due to the Boy Scouts' funding strength, to avoid the City having to enter multiple agreements with various organizations, and to have an entity in charge with proven experience in this arena. Day Decl. ¶ 10 [DE 240]. The Youth Committee sought and obtained the requisite approvals from various entities, including the city's Parks and Recreation Committee and the Mission Bay Park Committee, in order to develop the aquatic facility. *Id*. ¶¶ 6-11 [DE 239]. The Youth Committee representatives also participated in public hearings on its proposal to construct an aquatic park for youth. *Id*. ¶ 7 [DE 239]. In November 1987, the City entered

---

[1/] "DE __" refers to the document number assigned on the district court docket sheet.

[2/] In addition to the Boy Scouts, the City also has leases with the Girl Scouts, Boys and Girls Clubs of San Diego, and several Little League organizations that provide recreational and athletic activities. Rothans Decl. ¶ 8 (DE 142]. The Boy Scouts' Memorandum Of Points And Authorities In Support Of Further Motion For Summary Judgment, pages 4-5, provides additional details regarding the City's leasing practices and the nature of the lessees [DE 238].

into a lease with the Boy Scouts for the construction, maintenance, and operation of the aquatic facility at Fiesta Island. After the lease was executed, members of the Youth Committee continued to meet to discuss the proposed construction of the aquatic park facilities and issues regarding operation of the facilities. Day Decl. ¶ 20 [DE 240].

The property on Fiesta Island is leased to the Boy Scouts "solely and exclusively for the purposes of constructing, maintaining, and operating an aquatic safety training and recreational center in boating, sailing and water sports, and for such other related or incidental purposes as may be first approved . . . by the City Manager and for no other purpose whatsoever."[3/] Fiesta Island Lease (Lease), § 1.02 [DE 66, Exh. 3]. The lease also provides, *inter alia*, that:

> 1.11 Public Use. The general public shall not be wholly or permanently excluded from any portion of the premises. LESSEE may develop reasonable restrictions for the facility use provided they are consistent with the rights of the general public, and area [sic] designed to allow LESSEE to use the premises for the purposes specified herein.
>
> * * *
>
> 9.06 Terms of Use:
> 1. The Youth Aquatic Facility must be open to all youth-serving groups.
>
> 2. In order to give all groups an equal chance to use the Youth Aquatic Facility, [Boy Scouts] must send a letter annually to all the members of the Youth Advisory Council advising them of your operation and procedures to use the facility.
>
> 3. The Boy Scouts . . . can use/book no more than 75% of all available aquatic activities up to 7 days prior [of the intended use].

Lease [DE 66, Exh. 3].

This lease, consistent with the City's practices, includes a broad prohibition by the lessee against discrimination on various grounds, including religion, in "LESSEE's use of the premises," including the provision of "goods, services, [and] facilities." Lease, § 7.04 [DE 66, Exh. 3]. The Boy Scouts spent "more than $2 million from its own charitable sources" to build the Aquatic Center on Fiesta Island. Roy Decl. ¶ 10 [DE 148, Exh. 12,]; Day Decl. ¶ 19 [DE 240]. The Aquatic Center was built at no cost to the City. *Id*. The Boy Scouts is responsible for the costs of operation and maintenance of the facility, including public utilities. Lease, §§ 3.01, 6.03, 6.05 [DE 66, Exh. 3].

[3/] The Fiesta Island lease involves dedicated parkland in Mission Bay Park, and more specifically, Fiesta Island. According to the City Charter, such parkland may only be used for park, recreation, or cemetery purposes, unless two-thirds of the electorate vote otherwise. Charter, Art. V, § 55; Griffith Decl. ¶ 2 [DE 141].

ARGUMENT

I. THE LEASE BETWEEN THE BOY SCOUTS AND THE CITY GOVERNING DEVELOPMENT AND OPERATION OF THE YOUTH AQUATIC CENTER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. The Boy Scouts is Not a Religious Institution Under the Establishment Clause

The United States recognizes that in ruling on the constitutionality of the Balboa Park lease, this Court found that the Boy Scouts is a religious organization for purposes of the Establishment Clause. *See Barnes-Wallace*, 275 F. Supp. 2d 1259, 1271 (S.D. Cal. 2003).[4/] For the reasons set forth more fully below, however, we do not believe that the Boy Scouts is such an institution. Rather, the record establishes that it is a social and recreational organization dedicated to promoting good character, citizenship, and personal fitness in young boys in a manner that does not undermine, and in fact respects and supports, the religious values with which they enter the program. Accordingly, we respectfully ask the Court to reconsider its prior ruling that the Boy Scouts is a religious organization.

The Establishment Clause of the Constitution prevents the government from engaging in acts "that have the 'purpose' or 'effect' of advancing or inhibiting *religion*." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (emphasis added). The threshold question in this case, therefore, is whether the Boy Scouts, whose mission the plaintiffs assert is being advanced by the lease in question, is a religious institution for purposes of the Establishment Clause. *See, e.g.*, *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226-27 (9th Cir. 1996) (noting that before turning to the issue of whether a government-sponsored statue of the Aztec deity Quetzalcoatl violated the Establishment Clause, it must first consider whether the statue in question was "religious" for establishment purposes).

While the Constitution does not contain, and the Supreme Court has not yet announced, a definition of religion for purposes of the Establishment Clause, the Ninth Circuit considered the following three factors in *Alvarado*:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists

---

[4/] The Court also found that the Boy Scouts "concede[s] that it is a religious organization." 275 F. Supp. 2d at 1273. The United States notes that while the Boy Scouts has admitted that it is an organization with religious aspects, we do not believe it has conceded that it is a religious organization for purposes of the Establishment Clause. See, e.g., Boy Scouts' Response to Plaintiffs' Statement of Undisputed Material Facts ¶¶ 184-88 (stating that nonsectarian religious aspects of scouting are "immaterial."). [DE 170].

> of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Id. at 1229. The "formal and external signs" include: "formal services, ceremonial functions, the existence of clergy, structure and organization, observances of holidays and other similar manifestations associated with the traditional religions." *Id.* Applying this narrow definition[5/] of religion in the instant case leads to but one conclusion: the Boy Scouts is not a religious institution for purposes of the Establishment Clause.

The plaintiffs primarily contend that the Boy Scouts is a religious institution because the Scout Law requires a belief in God as a criterion of membership and the Scout Oath requires scouts to promise to do their duty to God.[6/] First Amended Complaint ¶ 5 [DE 66]. While there is this religious aspect to the Boy Scouts, neither the Scout Oath nor the Scout Law is primarily focused on it. Indeed, quite the opposite is true. The Scout Oath provides, in full, 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;

[5/] As the Ninth Circuit has made clear, while an expansive definition of religion "best serves free exercise values, the same expansiveness in interpreting the establishment clause is simply untenable in an age of such pervasive governmental activity." *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1537 (9th Cir.) (noting that "'a less expansive notion of religion [is] required for establishment clause purposes lest all "humane" programs of government be deemed constitutionally suspect'" (quoting L. Tribe, *American Constitutional Law* 827-28 (1978))), *cert. denied*, 474 U.S. 826 (1985); *accord United States v. Allen*, 760 F.2d 447, 450-51 (2d Cir. 1985) (recognizing that "all that is 'arguably religious' should be considered religious in a free exercise analysis," while "anything 'arguably non-religious' should not be considered religious in applying the establishment clause" (quoting L. Tribe, *American Constitutional Law* 828 (1978))).

[6/] In its previous ruling, this Court expressed concern about various other scouting activities, such as a scout earning a merit badge, which would move him one step closer to satisfying the requirements for becoming an Eagle Scout, by exploring his own religious beliefs. *Barnes-Wallace*, 275 F. Supp. 2d at 1271. Allowing a scout to voluntarily earn such a merit badge no more makes the Boy Scouts a religious institution than allowing a student to satisfy her Band requirements by playing a recital at a local church makes her school a religious institution. Indeed, given Ninth Circuit precedent, it is simply inconceivable that a lease between a governmental entity and a private school that accommodated an individual's religious beliefs in such ways would trigger the Establishment Clause. *See EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir.) (holding that a private school with a religious charter, daily class prayers, prayer before meals, required Christian religious instruction, and mandatory attendance at worship services was not a religious institution), *cert. denied*, 510 U.S. 963 (1993). For the same reason, it is extremely unlikely that the Ninth Circuit would find that the lease in question runs afoul of the Establishment Clause.

Moreover, as noted below, a scout's religious beliefs are left to him and his family, and are in no way dictated by the Boy Scouts. Thus, any exploration of them is done individually and without any influence or direction from the Boy Scouts.

To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

[DE 163, Exh. 66, p. 1002]. The Scout Law, in turn, provides as follows:

> **A Scout is TRUSTWORTHY.** A Scout tells the truth. He is honest, and keeps his promises. People can depend on him.
> **A Scout is LOYAL**. A Scout is true to his family, friends, Scout leaders, school, and nation.
> **A Scout is HELPFUL**. A Scout cares about other people. He willingly volunteers to help others without expecting payment or reward.
> **A Scout is FRIENDLY.** A Scout is a friend to all. He is a brother to other Scouts. He offers his friendship to people of all races and nations, and respects them even if their beliefs and customs are different from his own.
> **A Scout is COURTEOUS.** A Scout is polite to everyone regardless of age or position. He knows that using good manners make it easier for people to get along.
> **A Scout is KIND.** A Scout knows there is strength in being gentle. He treats others as he wants to be treated. Without good reason, he does not harm or kill any living thing.
> **A Scout is OBEDIENT**. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobeying them.
> **A Scout is CHEERFUL**. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.
> **A Scout is THRIFTY.** A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.
> **A Scout is BRAVE.** A Scout can face danger although he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.
> **A Scout is CLEAN.** A Scout keeps his body and mind fit. He chooses the company of those who live by high standards. He helps keep his home and community clean.
> **A Scout is REVERENT.** A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

Boy Scout Law (2002), *at* http://www.usscouts.org/advance/boyscout/bslaw.html.

As can be seen, the Scout Oath contains a number of promises in addition to the one complained of by plaintiffs. A scout promises to do his duty to his country, to help other people, to stay physically fit and mentally alert, to be honest, and to obey the Scout Law. Of the twelve guiding principles set forth in the Scout Law, only the last mentions anything remotely religious. In context, it is clear that neither the Scout Oath nor the Scout Law is the religious manifesto that plaintiffs would have the Court believe, but instead is the blueprint for an organization that, in the words of its congressional charter, is dedicated "to promot[ing] . . . the ability of boys to do things for themselves and others, . . . [and] to teach[ing] them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 30902 (2002). At

its heart, the Boys Scouts is a social and recreational organization dedicated to promoting good character, citizenship, and personal fitness in boys.

Consistent with the Scout Law and the Scout Oath, the record clearly establishes that the Boy Scouts' activities are not religious. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001) (noting that in determining whether an organization's activities are religious "what matters is the substance of [its] activities"). Specifically, the Boy Scouts achieves its objective of developing character, citizenship, and personal fitness in boys by focusing on a vigorous program of outdoor activities and not through religious instruction or worship. Indeed, the Boy Scouts' governing documents make clear that it does not espouse any one religion or any particular religious belief. The Boy Scouts' Bylaws, Art. IX, § 1, for example, stress that religious instruction is better reserved for the "home and the organization or group with which the member is connected." [DE 163, Exh. 74, p.1059]. Similarly, they declare that no member shall be required "to take part in or observe a religious ceremony distinctly unique" to a church or other religious organization. *Id.* The Scoutmaster Handbook further provides that the Boy Scouts is a "nonsectarian organization" and reminds Scoutmasters that "Religious instruction is the responsibility of a boy's parents or guardian and his religious institution." Boy Scouts of America, *Handbook: Recommended for All Scout Leaders* 128 (2001). [DE 212]. In short, the Boy Scouts does not address "fundamental and ultimate questions having to do with deep and imponderable matters," *Alvarado*, 94 F.3d at 1229, but instead provides a safe social and recreational outlet for boys that does not undermine, and in fact respects and supports, the religious values and character traits that parents choose to instill in their children.

Not surprisingly, most courts to have squarely addressed the issue have specifically held that, notwithstanding the portions of the Scout Law and Scout Oath that plaintiffs find offensive, the Boy Scouts is not a religious organization. *See Powell v. Bunn*, 185 Or. App. 334, 363-64, 59 P.3d 559, 580 (2002) (holding that the Boy Scouts' activities are primarily social and recreational); *Dale v. Boy Scouts of America*, 160 N.J. 562, 601 n.10, 734 A.2d 1196, 1217 n.10 (1999) ("That the Boy Scouts' oath expresses a belief in God does not make it a religious institution."), *rev'd on other grounds*, 530 U.S. 640 (2000); *cf. Sherman v. Community Consol. Sch. Dist. of Wheeling Township*, 8 F.3d 1160 (7th Cir. 1993) (holding, without addressing threshold inquiry of whether the Boy Scouts is a religious

organization, that elementary school did not violate the Establishment Clause by allowing the Boy Scouts to use its facilities), *cert. denied*, 511 U.S. 1110 (1994). Although the Ninth Circuit has not yet ruled on the precise question at issue here, that Court's holding in *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), simply precludes a finding that the Boy Scouts is a religious institution. In *Kamehameha Schools*, the Ninth Circuit held that a group of private schools with a religious charter, daily class prayers, prayer before meals, required Christian religious instruction, and mandatory attendance at worship services were, nonetheless, not religious institutions because the curriculum was predominantly secular. *Id.* at 463-64 ("We conclude the Schools are an essentially secular institution operating within an historical tradition that includes Protestantism, and that the School's purpose and character is primarily secular, not primarily religious."). If such a school is secular for legal purposes, then *a fortiori* the Boy Scouts is as well.[7/]

A holding that the Boy Scouts is a religious institution is inconsistent with (or at least render superfluous) the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), as it is well-settled that the Boy Scouts could have done everything it sought to do in that case had it simply been a religious institution for purposes of the Free Exercise Clause.[8/] In the end, the membership

---

[7/]The Oregon Court of Appeals' decision in *Bunn* is instructive on this point as well:

> Plaintiff approaches the religious character of any group or organization as though it is an all-or-nothing proposition. . . . To be sure, there is a religious component to the Boy Scouts–that is, a scout must profess to believe in God and must take an oath to do his duty to God. In addition a scout may choose to earn a religious emblem for his uniform by exploring his religious values. 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.

185 Or. App. at 363-64.

[8/]*Dale* involved a claim by a man that New Jersey's anti-discrimination law prevented the Boy Scouts from denying him a leadership position on the ground that he was homosexual. 530 U.S. at 644. The Free Exercise Clause, however, insulates a religious organization's employment decisions regarding its leaders. *See Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). Because this doctrine is based on the Constitution and not Title VII, it provides religious organizations immunity from the operation of various state and federal laws affecting their ability to choose their leaders or practice their beliefs. *See Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (Americans with Disabilities Act and Louisiana employment law), *cert. denied*, 531 U.S. 814 (2000). And, if the Boy Scouts is not a religious organization for purposes of the Free Exercise Clause, then it simply cannot be a religious organization for purposes of the Establishment Clause, as the Free Exercise Clause's definition of a religious organization is much more expansive than the Establishment Clause's. *See supra* fn. 4.

requirements in question – that scouts believe in God and take an oath to do their duty to God – no more make the Boy Scouts a religious institution than a requirement that Congress open each legislative day with a prayer makes that body one.[9/] *See* Kent Greenawalt, *Religion As a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 768 (1984) ("A simple requirement that members believe in God would not alone make an organization religious."). Because the benefits at issue in this case, access to aquatic recreational activities, are purely secular, and the Boy Scouts is not a religious institution, plaintiffs' Establishment Clause claim is without merit as a threshold matter.

B. Even Assuming the Boy Scouts is a "Religious Organization" Under the Establishment Clause, the Fiesta Island Lease is Constitutional

The Supreme Court has held that the Establishment Clause "require[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion." *Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985). Neutrality does not, however, mean that the government must have nothing to do with religious organizations or organizations that, like the Boy Scouts, have some degree of connection to religion. Quite to the contrary, in applying the neutrality principle in the innumerable contexts in which government may interact with religion, the government must take care not to engage in invidious discrimination against religion. As Justice Goldberg observed in his concurrence in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963):

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

[9/] While Congress's practice of opening each legislative day with a prayer may implicate (without, of course, actually violating) the Establishment Clause, *see Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that such prayers do not violate the Establishment Clause), no one can seriously argue that the practice tums Congress into a religious institution. Put another way, no one could seriously argue that a lease between the federal government and the California State Legislature runs afoul of the Establishment Clause on the ground that the California State Legislature opens its sessions with a prayer or, for that matter, because it retains a chaplain. *See* Cal. Code Ann. §§ 9170, 9171, 9320 (West 1980) (providing for a Chaplain), S. Res. No. 4, 2003-2004 Sess. (providing for daily prayer). Similarly, no one could plausibly contend that a lease between a governmental actor and civic clubs or fraternal organizations that open their meetings with a prayer and the pledge of allegiance (with the phrase "one nation under God") would violate the Establishment Clause.

Thus, in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995), the Supreme Court held that a religious student magazine's receipt of free printing services from a school-administered activities fund did not violate the Establishment Clause. The Court explained: "[I]n enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'" *Id.* (quoting *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947) (alteration in original)). This principle is not one exclusive to the Establishment Clause, but is a comprehensive ideal underlying several constitutional provisions: "[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion–all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits." *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

As set forth below, the City's negotiation of a value-for-value contract with the Boy Scouts to yield the maximum public benefit from property at the least cost to the City, as the City has done with numerous other nonprofit groups, is an admirable example of neutrality toward religion. It does not violate the Establishment Clause.

1. The Fiesta Island Lease is a Value-for-Value Contract

The Supreme Court has upheld numerous contractual arrangements with plainly religious organizations for the provision of aid, grants, and benefits. Indeed, the Supreme Court has noted that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 n.4 (1988) (statute providing for abstinence and family education grants to organizations, including religious ones, did not violate the Establishment Clause).

This case, however, is much easier to analyze than the grant, aid, and benefit cases because it does not involve a grant, aid, or benefit being given by the City to the Boy Scouts. Rather, it involves a marketplace transaction in which each side received something of value. The Boy Scouts agreed to build and endow the Aquatic Center, assume all costs for maintenance, and open the Center for the benefit of all youth-serving organizations, thus providing the City with a valuable benefit. Fiesta Island

Lease §§ 1.11, 6.03, 6.12, 9.06 [DE 66, Exh. 3]. In exchange, the Boy Scouts received a 25-year lease on property that was dedicated parkland with no commercial value. *Id*. at §§ 2.01, 3.01; Griffith Decl. ¶ 2 [DE 141]. Moreover, subject to City approval, the Boy Scouts obtained the right to design the center and establish operating procedures that accommodated use for its members as well as the public. Fiesta Island Lease §§ 6.12, 9.06 [DE 66, Exh. 3]. In light of the numerous cases in which the Supreme Court has upheld government benefits being given through grants or aid to plainly religious organizations, discussed *infra*, it is difficult to imagine how an arms-length contract such as this could have the purpose or effect of advancing religion.

The Ninth Circuit has held that a city may enter into a lease with a religious entity without violating the Establishment Clause. *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). In *Christian Science Reading Room*, the Ninth Circuit ruled that San Francisco did not violate the Establishment Clause by entering a lease with a religious organization that permitted it to operate a religious information center at the San Francisco International Airport. *Id*. at 1015. Judge Reinhardt, writing for the court, noted that the purpose of the lease was "purely secular: to obtain revenue," *id.* at 1014, and the principal effect of the lease was not to advance or endorse religion given the diversity of tenants at the airport. *Id.* at 1014-1015. Similarly, here the City's leasing of various properties to nonprofit groups ensures that the properties serve the public at a reduced cost to the City. And as with the airport leases, the purpose of the Fiesta Island lease was "purely secular": to construct, maintain, and operate an aquatic center on a piece of undeveloped dedicated parkland.

2. Even If the Fiesta Island Lease Were Aid to the Boy Scouts, It Would Be Fully Constitutional Under the Supreme Court's Aid Cases

In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Supreme Court upheld a program that loaned instructional aids such as computers to schools, including religious schools, to be used for secular instruction. A four-Justice plurality found that aid that 1) does not "result in religious indoctrination by the government"; and 2) does not "define its recipients by reference to religion" does not violate the Establishment Clause. *Id.* at 808. In other words, secular aid distributed without reference to the religion of the recipient is constitutional. *See id.* at 820; *id.* at 837 (O'Connor, J., concurring) ("Reduced

to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.").

Justices O'Connor and Breyer, who joined in the judgment and wrote separately, would add a third requirement: that the secular aid not be *actually diverted* to religious use. *Id.* at 857 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question is, or has been, used for religious purposes."). However, Justices O'Connor and Breyer made clear that the actual diversion must be significant. *De minimis* diversions of government aid to religious purposes are insufficient to create an Establishment Clause violation. *Id.* at 861 (O'Connor, J., concurring) ("The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.").

Thus, to the extent that the Fiesta Island lease could even be considered "aid" rather than an arms-length contract with the Boy Scouts, this "aid" satisfies the standard of the plurality in *Mitchell.* First, there is no evidence whatsoever that the City chose the Boy Scouts as the lessee "by reference to religion." *Id*. at 808. To the contrary, the Boy Scouts has presented evidence that the Youth Committee, comprised of over 40 local youth organizations, chose the Boy Scouts as its representative because the Boy Scouts was in the best position to raise funds for, oversee the construction of, and take responsibility for the maintenance and operation of an aquatic center for the community at large. *See* Ward Decl. ¶¶ 6, 10 [DE 239]. Second, the activities at the Aquatic Center in which the Boy Scouts and numerous other youth organizations engaged are purely secular in nature. Put simply, boating is boating, kayaking is kayaking, and swimming is swimming, regardless of who engages in it. As the Supreme Court aptly explained in *Bowen*, the abstinence and family education projects at issue in that case were "facially neutral projects" that were not "'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." 487 U.S. at 613. If that is the case with abstinence and family education programs, then it is even more true with canoeing, kayaking, and other water sports.

The Fiesta Island lease also satisfies the additional criterion set forth by the *Mitchell* concurrence. There is no evidence that the aquatic programs have been "actually diverted" to religious

use by the Boy Scouts. It is hard to imagine how they could be. To the extent that some scouts might hypothetically do something that might be deemed religious while engaging in water sports, such as wearing religious merit badges or reciting the Scout Law with its reference to reverence, such activities would certainly fall within the *de minimis* exception set forth by Justice O'Connor and Breyer in *Mitchell.*

The conclusion that any aid here is constitutional because it is secular in nature, goes to secular purposes, and was not distributed on the basis of the religious status of the recipient is buttressed by the Court's pre-*Mitchell* decisions. *See Agostini v. Felton*, 521 U.S. 203, 225 (1997) (upholding program in which public school teachers entered parochial schools to provide special educational services, and stating "we have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid."); *Bowen*, 487 U.S. at 605 (upholding statute including religious organizations as recipients of grants for abstinence and family education programs, and noting that there was no "suggestion that religious institutions or organizations with religious ties are uniquely qualified to carry out these services"); *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968) (upholding textbook loans to student in parochial schools and observing "parochial schools are performing, in addition to their sectarian function, the task of secular education."); *see also Rosenberger*, 515 U.S. at 840 (upholding inclusion of religious news magazine in student activities expense reimbursement program, in light of the diversity of the groups funded and the fact that "[t]here is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.").

As set forth in section I (A), *supra*, as a threshold matter the Boy Scouts is not a religious organization. Yet assuming *arguendo* that it is, the religious nature of a recipient of a government benefit does not make all that it does religious and thereby render purely secular government benefits, like use of an aquatic center, unconstitutional. Plaintiffs' arguments to the contrary are an attempt to resurrect the "pervasively sectarian" doctrine that the plurality and separate opinions in *Mitchell* eliminated. As this Court correctly noted in its earlier decision, 275 F. Supp. 2d at 1269, the *Mitchell* decision "effectively, if not explicitly, overruled use of the pervasively sectarian test." *See also Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001) (holding that O'Connor's opinion in

Mitchell replaced the pervasively sectarian doctrine with one of "neutrality plus" no diversion of aid). Under the pervasively sectarian doctrine, aid was presumed to advance religion when it was given to organizations, such as parochial schools, that were thought to be so infused with religion that even secular aid would effectively become the equivalent of religious aid. *See Hunt v. McNair*, 413 U.S. 734, 743 (1973). The plurality in *Mitchell* observed that the concept had not been invoked since 1985, despite subsequent cases permitting aid to parochial schools; that the concept had failed to give due recognition to the fact that government aid could fulfill its secular purpose when given to any recipient; and that the "pervasively sectarian" concept "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 828. Justices O'Connor and Breyer similarly abandoned the pervasively sectarian concept and rejected an underlying principle of that doctrine; that "the secular educational function of a religious school is inseparable from its religious mission." *Id.* at 853. Instead, their separate opinion maintained that for there to be a constitutional violation there must be *actual* diversion to religious uses. They made clear that aid that has "the capacity for, or presents the possibility of, such diversion" is insufficient. *Id.* at 854.

Both the plurality and the separate opinion in *Mitchell* focus on the nature of the aid and whether it is distributed without reference to religion, with Justices O'Connor and Breyer adding the further requirement that the aid not be diverted to religious purposes. They both reject the idea that certain types of organizations are so religious that any aid given to them is necessarily constitutionally tainted. Yet this is precisely what plaintiffs would urge here. Their argument appears to be that helping to provide aquatic activities to the Boy Scouts advances religion because it is a religious institution. But the fact that the Scout Oath acknowledges a duty to God and that reverence is one of the virtues listed in the Scout Law, and that a few scouting activities have some religious aspects, does not convert aquatic activities into religious ones. This is precisely why the Court abandoned the pervasively sectarian doctrine: the nature of the aid and what is done with it, rather than the nature of the organization receiving it, should be the focus of Establishment Clause inquiry. And there are no facts in this case indicating that the Aquatic Center activities are anything but the secular recreational activities that the City envisioned for the site. While the lease is a value-for-value transaction that does not "aid" the Boy

Scouts, even under an "aid" analysis the lease is constitutional, because 1) the lease involves providing a venue for secular activities; 2) the Boy Scouts were not chosen as lessee by "reference to religion;" and 3) there is no evidence of actual diversion to religious uses.

3. Under Any of the Formal Tests for Establishments, the Lease is Constitutional

The courts have used various formal tests in analyzing alleged establishments of religion. The oldest is the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Supreme Court has in recent years used *Lemon* in some cases and not in others. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (majority not citing *Lemon*), *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying *Lemon* and other tests). In all recent cases, the Court has to some extent applied an "endorsement test," asking if the challenged action would appear to the reasonable observer to constitute government endorsement of a particular religion or religion generally. *See, e.g.*, *Zelman*, 536 U.S. at 654-656; *Good News Club*, 533 U.S. at 118-119; *Mitchell*, 530 U.S. at 835; *Santa Fe*, 530 U.S. at 305-308. The Court also has sometimes applied a "coercion test," inquiring into whether members of the community are pressured to engage in religious activity. *See*, *e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992). The two most recent Ninth Circuit Establishment Clause decisions do not cite *Lemon* at all. *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) (applying endorsement test of *Good News Club*), *cert. denied*, 124 S. Ct 1146 (2004); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (applying endorsement test and coercion test), *cert. denied*, 124 S. Ct. 62 (2003).

While the formal tests are helpful tools, the Court instructed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that the ultimate question for courts evaluating Establishment Clause challenges to government action is more basic:

> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith–as an absolutist approach would dictate–the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes religion or religious faith, or tends to do so.*

Id. at 678 (emphasis added). Similarly, in *Lee v. Weisman*, the Court instructed that

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow

> from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

505 U.S. at 598 (quoting *School Dist. of Abington Township. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring)). While under all the formal tests the City's lease with the Boy Scouts for Fiesta Island is constitutional, more fundamentally it is constitutional because it does not "so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact," *id.*, and does not "in reality, . . . establish[ ] religion or religious faith, or tend[ ] to do so," *Lynch*, 465 U.S. at 678.

a. *The Lemon Test*

Challenged government action passed the original formulation of the *Lemon* test "if it had 'a secular legislative purpose,' if its 'principal or primary effect' was one that 'neither advance[d] nor inhibit[ed] religion,' and if it did 'not foster an excessive government entanglement with religion.' *Zelman*, 536 U.S. at 668 (O'Connor, J., concurring) (quoting *Lemon*, 403 U.S. at 612-613)). In *Agostini*, the Court "folded the entanglement inquiry into the primary effect inquiry," making it a two-part test. *Zelman*, 536 U.S. at 668 (O'Connor, J., concurring).

The leasing practice of the City, and the particular lease for the Aquatic Center at issue here, have secular purposes. Both the City's broader leasing practice and the Fiesta Island lease seek to provide the maximum public benefit at the least cost to the City. See Griffith Decl. ¶ 13 [DE 141]; Rothans Decl. [DE 142]. In the case of the Aquatic Center, the City seeks to provide opportunities for young people throughout the San Diego area to participate in recreational activities. See Fiesta Island Lease, §§ 1.02, 1.11, 6.02 [DE 66, Exh. 3]. This is plainly a secular purpose, and satisfies this prong of *Lemon*. *See Bowen*, 487 U.S. at 602 (a practice will fail the purpose prong "only if it is motivated wholly by an impermissible purpose"); *see also Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (same), *cert. denied*, 510 U.S. 1044 (1994).

Likewise neither the leasing policy in general nor the Aquatic Center lease in particular has the principal or primary effect of advancing religion. The effect of the broader policy is to maximize the use of property for a wide array of activities serving the public. And the principal and primary effect of the Aquatic Center lease is to create a recreational center where youth from throughout San Diego can

engage in water sports they previously had little opportunity to enjoy. As set forth in Section (B)(1), *supra*, the policy does not endow the Boy Scouts with a government benefit in light of the value-for-value nature of the lease. To whatever extent there might be a benefit to the Boy Scouts, it is a secular benefit of recreational opportunities, one that was distributed without reference to religion and which has not been diverted to religious purposes.

b. *Endorsement*

Under the endorsement test, a challenged government practice "must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S., at 694, (O'Connor, J., concurring). The principle underlying this vigilance is that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O' Connor, J., concurring). Whether government endorsement of religion exists is determined from the vantage point of a reasonable, objective observer who is "'deemed aware' of the 'history and context' underlying a challenged program." *Zelman*, 536 U.S. at 655 (quoting *Good News Club*, 533 U.S. at 119).

The reasonable observer would know that lessees have included more than 100 organizations, see Rothans Decl, [DE 142], including such diverse organizations as the Jewish Community Center, the Vietnamese Federation of San Diego, several YMCA's, and the Boys and Girls Club. City's List Of Nonprofit Lessees [DE 145 Exh. 17]. Moreover, over 40 youth organizations, including the Boy Scouts, formed the Fiesta Island Youth Facility Committee to develop the proposal for Aquatic Center on the Mission Bay property. Ward Decl. ¶ 6 [DE 239]. There is no evidence or indication that the lease ultimately negotiated between the City and the Boy Scouts, which involved multiple community representatives, was some "ingenious device with the purpose of aiding a religious cause." *Rosenberger*, 515 U.S. at 840. The Supreme Court has consistently held that providing equal access to religious groups in government-controlled fora and benefits programs open to a wide variety of groups does not endorse religion. *Good News Club*, 533 U.S. at 115 (allowing Christian youth group access to school under broad community use policy would not endorse religion); *Rosenberger*, 515 U.S. 819, 841 (permitting religious student magazine participation in student activities fund program would not

endorse religion); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (giving group access to school after-hours for showing of film to public would not endorse religion); *Widmar* v. *Vincent*, 454 U.S. 263, 271 n.10 (1981) (access of student religious group to university facilities would not "endorse or promote" religion). As the Supreme Court held in *Lamb's Chapel*, in light of the broad array of groups granted access, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." 508 U.S. at 395.

In addition to knowing how the Fiesta Island lease fit into the broader context of the City's leasing practice, the reasonable observer also is presumed to know that the Youth Committee put the Boy Scouts forward as the best qualified group to develop the project. The observer would be aware of the substantial monetary outlays by the Boy Scouts pursuant to the lease. And the observer would know the Aquatic Center is enjoyed by youth from throughout the region. The reasonable observer would see not an endorsement of religion in this, but rather would see another instance of the City, as is its practice, entering a practical lease with a nonprofit organization to maximize the benefit public properties provide to the public.

c. *Coercion*

The Supreme Court also has applied, in certain cases, a "coercion test," examining "whether the community would feel coercive pressure to engage in the [challenged] activities." *Good News Club*, 533 U.S. at 115. As the Court stated in *Lee* v. *Weisman*, 505 U.S. at 587, "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587. There is nothing here that could be seen to create coercive pressure to participate in religious exercise. Putting aside whether the Boy Scouts even requires religious exercise of members as the concept is understood legally, the simple fact here is that no child has to join the Boy Scouts to use the Aquatic Center. There is, thus, nothing here that could amount to unconstitutional coercion.

Applying the formal tests, the value-for-value lease for Fiesta Island between the Boy Scouts and the City is constitutional. It has a secular purpose, and does not have the principal or primary effect of advancing religion. It does not convey to the reasonable observer, informed about the City's leasing practice of maximizing the public benefit from property by entering agreements with nonprofit groups,

and informed of the history of the Fiesta Island site and the efforts of the youth organizations of San Diego to craft a way to maximize its usefulness to the community, any endorsement of religion. And it coerces no one in religious matters. Rather, it opens up an underused resource to people regardless of faith.

Moreover, even if the Boy Scouts is a religious institution, the particular holdings of the Supreme Court decisions closest factually to this case compel a conclusion that there is no Establishment Clause violation. The cases addressing the issue of government aid programs that include religious recipients instruct that where aid is provided by the government without reference to religion, is secular in nature, and is not actually diverted to religious activities, aid recipients may constitutionally include religious organizations.

But more fundamentally, the value-for-value lease, which results in the Aquatic Center being administered by the Boy Scouts but open to all, is not something which reasonably can be said to "in reality . . . establish[ ] a religion or religious faith, or tend[ ] to do so." *Lynch*, 465 U.S. at 678. The Aquatic Center lease "by any realistic measure create[s] none of the dangers which [the Establishment Clause was] designed to prevent." *Lee*, 505 U.S. at 598. It is thus fully constitutional and should be upheld against Establishment Clause challenge.

II. PLAINTIFFS HAVE NOT PRESENTED SUFFICIENT EVIDENCE TO SUPPORT AN EQUAL PROTECTION CLAIM

Plaintiffs contend that the City, by entering the Fiesta Island Lease with the Boy Scouts, has discriminated against them based on religion and sexual orientation in violation of the Equal Protection Clause because they cannot join the Boy Scouts. Plaintiffs can only succeed on this claim by showing that the City's actions are motivated by a discriminatory purpose and that they have a discriminatory effect. *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979); *McLean* v. *Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999), *cert. denied*, 528 U.S. 1086 (2000); *Barnes-Wallace*, 275 F. Supp. 2d at 281. The additional evidence submitted by the Boy Scouts, coupled with the evidence in the record, establishes the absence of discriminatory intent by the City and, therefore, plaintiffs cannot prove their claim.

As the Supreme Court explained, discriminatory purpose requires evidence the defendant acted, "in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*,

442 U.S. at 279. While foreseeable or actual discriminatory impact may be indicative of intent, it is not enough alone, absent significant disparities in treatment, to establish intent. *Id*. at 279 & n.25; see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) (equal protection violation established when City denies applications to all 200 Chinese applicants, and grants 80 applications to all but one non-Chinese applicants). Thus, in *Feeney*, 442 U.S. at 279, the Court held that the Commonwealth's knowledge or the foreseeability that its veteran's preference program would have an adverse effect on women was insufficient to establish intent to exclude women, and the equal protection claim was rejected. *See also* *Lee* v. *City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (discriminatory purpose is not established by enforcement of neutral policies that have a foreseeably disproportionate impact on an identifiable group).

The record now reflects that more than 40 organizations that serve youth in the San Diego area formed the Fiesta Island Youth Facility Committee to develop a proposal to construct a youth aquatic center at Fiesta Island to serve their constituents. Ward Decl. ¶ 6 [DE 239]; Day Decl. ¶ 8 [DE 240]. The Youth Committee proposed to the City of San Diego that the Boy Scouts, a Youth Committee member, provide the funding for construction and maintenance of the facilities, and have operating responsibility. The Youth Committee proposed one entity for purposes of the lease and operations due to the Boy Scouts' funding strength, to avoid the City having to enter multiple agreements with various organizations, and to have an entity in charge with proven experience in this arena. Day Decl. ¶ 10 [DE 240]. Thus, the City's ultimate lease with the Boy Scouts was the result of negotiations not only with the Boy Scouts, but also public hearings that involved representatives of the Youth Committee, and the community's youth organizations' support for the Boy Scouts to be their representative. Ward Decl. ¶ 6-11 [DE 239]. Even after the lease was executed, members of the Youth Committee continued to meet to discuss the proposed construction of the aquatic park facilities and issues regarding operation of the facilities. Day Decl. ¶ 20 [DE 240].

Thus, the materials presented by the Boy Scouts reflect the absence of any discriminatory intent by the City in ultimately negotiating with the Boy Scouts for the Fiesta Island lease. Moreover, there is no evidence to show or suggest that the City negotiated with or selected the Boy Scouts *because of* its membership policies, or with the objective that the Boy Scouts' membership policies be utilized to

restrict others' ability to have access to the public property. As explained, an extensive array of local organizations expressed their support for the aquatic park project and the Boy Scouts' leadership role in this project. Ward Decl. ¶ 6, Exh. 2. Thus, nothing in the record reflects the City's deliberate targeting of the Boy Scouts as a potential (and actual) lessee because of its membership practices, especially given that the community at large selected the Boy Scouts as its representative. As this Court has already acknowledged correctly, the City's mere knowledge of the Boy Scouts membership policies is not evidence of discriminatory intent. *Barnes-Wallace*, 275 F. Supp. 2d at 1281; *see Feeney*, 442 U.S. at 279. Thus, based on the record currently before the court (and in the absence of plaintiffs submitting substantive, contrary evidence establishing discriminatory animus or purpose in the legislative process), plaintiffs have failed to submit sufficient evidence of discriminatory intent to stave off summary judgment.

Nor is there evidence of any discriminatory effect here. The United States notes that the district court concluded that there was disputed evidence regarding whether the Boy Scouts have exclusive access to the aquatic park facilities for its activities. *Barnes-Wallace*, 275 F. Supp. 2d at 1285. It is not disputed, however, that plaintiffs have never sought, nor have they been specifically denied, access to the Fiesta Island facilities. See, *e.g.*, Barnes-Wallace Decl. ¶¶ 8, 10 [DE 157]. Even if the Court found that the Boy Scouts had exclusive access during its events, plaintiffs, just as any other non-scout and his parents, would be excluded. Different treatment due to membership or lack of membership in a club is subject to rational basis review. *See Besig* v. *Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1275 (9th Cir. 1982) (rejecting assertion of right to association as basis for strict scrutiny; park facilities run by private club, which granted different levels of access to members and nonmembers, survived rational basis since management by the club, with rules, was critical to maintaining the facilities); *see also National Park Conservation Ass'n* v. *Norton*, 324 F.3d 1229, 1245 (11th Cir. 2003) (summary judgment affirmed for National Park Service's (NPS') decision to allow lessees of property once managed by Florida, but now part of the federal park system, to retain exclusive access pending completion of NPS's review, and bar all members of the public from access to the now-federal property; rational basis for classification based on lessee status defeated equal protection violation). The City rationally determined that the Boy Scouts was the best suited entity for the significant and costly task of constructing,

maintaining, and operating an aquatic facility for all youth in the San Diego community, particularly when the City did not have, and continues to lack, the financial means to operate this facility for the public at large, and, therefore, there is no Equal Protection violation here. *See Besig*, 683 F.2d at 1276-1277.

CONCLUSION

For the foregoing reasons, this Court should grant the Boy Scouts' Further Motion For Summary Judgment.

Respectfully submitted,

DATED: March 5, 2004

R. ALEXANDER ACOSTA
Assistant Attorney General

CAROL C. LAM
United States Attorney
Southern District of California

J. MICHAEL WIGGINS
Deputy Associate Attorney General

_____
SHELDON T. BRADSHAW
DAVID K. FLYNN
ERIC W. TREENE
JENNIFER LEVIN
Attorneys for the United States as Amicus
U.S. Department of Justice
950 Pennsylvania Ave, N.W.
MJB 3336
Washington, D.C. 20035
(202) 353-8622

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am above the age of 18 years, a citizen of United States, and not a party to this action or proceeding. My business address is U.S. Attorney's Office, Southern District of California, 880 Front Street, San Diego, California 92101.

I hereby certify that on this date, the foregoing United States' Memorandum of Points and Authorities as Amicus Curiae in Support of Partial Summary Judgment for the Boy Scouts of America and Desert Pacific Council, Boy Scouts of America was served on all counsel of record identified below by Federal Express, overnight mail, and sent to their last known address as follows:

Mark W. Danis, Esq.
M. Andrew Woodmansee, Esq.
Shannon M. Dailey, Esq.
Morrison & Foerster LLP
3811 Valley Centre Drive Ste 500
San Diego, CA 92130-2332

Jordan C. Budd, Esq.
Elvira Cacciavillani, Esq.
ACLU Foundation of San Diego
& Imperial Counties
P.O. Box 87131
San Diego, CA 92138-7131

Hughes Hubbard & Reed LLP
George A. Davidson
Carla A. Kerr
One Battery Park Plaza
New York, New York 10004

Hughes Hubbard & Reed LLP
Scott H. Christensen
1775 I Street, N.W.
Washington, D.C. 20006-2401

John P. Mullen, Esq.
Deputy City Attorney
Office of the City Attorney of San Diego
Civil Division
1200 Third Ave., Suite 1100
San Diego, CA 92101-4100

M. E. Stephens, Esq.
Lynn, Stock & Stephens
2445 Fifth Avenue, Suite 330
San Diego, CA 92101

Hughes Hubbard & Reed LLP
Charles Avrith (State Bar No. 96804)
Alicia Mew (State Bar No. 190943)
350 South Grand Ave., 36th Floor
Los Angeles, California 90071

Executed in San Diego, California, this __ day of March, 2004.

_____