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UNITED STATES DISTRICT COURT
FOR THE 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. 00 CV 1726 J (AJB)

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF DEFENDANTS
MOTION FOR SUMMARY
JUDGEMENT AND IN OPPOSITION
TO PLAINTIFFS MOTION FOR
SUMMARY JUDGEMENT**

Date: April 5, 2004
Time: 10:30 a.m.
Courtroom 12
Hon. Napoleon A. Jones, Jr.

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INTEREST OF AMICUS CURIAE¹

1
2 The American Civil Rights Union (ACRU) is a non-partisan legal policy organization
3 dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not
4 just those that might be politically correct for a time or fit a particular ideology. Those setting the
5 organization's policy as members of the Policy Board are former U.S. Attorney General Edwin
6 Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy
7 Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney
8 General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q.
9 Wilson, Walter Williams, Professor of Economics at George Mason University, former Ambassador
10 to Costa Rica Curtin Winsor, Jr., L. Clayburn LaForce, Dean Emeritus of the Anderson School of
11 Business at UCLA, former Editor-in-Chief of the Reader's Digest and former Director of the USIA
12 Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.
13
14

15 This is precisely the sort of case that is of interest to the ACRU, because we are most
16 concerned about protecting those whose rights and liberties may be overlooked or infringed due to
17 political correctness or other political bias. In this case, we are particularly concerned that the
18 liberty interests of the Boy Scouts to promote their traditional moral values is properly understood.
19
20
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22
23
24
25

26 _____
27 ¹ The American Civil Rights Union is a non-profit, 501(c)(3) corporation with no stock and no
28 parent corporations.

1
2 **ARGUMENT**

3 **I. This Case Does Not Involve Aid to Religion, But, Rather, Aid from the Boy Scouts to**
4 **the City**

5 This is not a case involving aid to religion. The City of San Diego is not subsidizing the Boy
6 Scouts. The Boy Scouts are subsidizing the City and people of San Diego.

7 While the lease involves no significant rental payment, it requires the Scouts to spend
8 millions in capital improvements, operating costs, and maintenance over the life of the lease to
9 provide a first class youth aquatic recreation center. Under the lease, that Center is open to the
10 general public on a non-discriminatory basis and heavily used by the public and non-Scouts.

11 The required Scout payments under the lease include:

12 --the immediate expenditure of \$1.5 million to build and endow the Youth Aquatic Center,
13 as part of a \$4 million capital campaign;

14 --the full costs of the operation and maintenance of the premises, which will involve millions
15 of dollars over the life of the lease;

16 --all taxes levied on the property during the lease term;

17 --the costs of maintaining property damage, fire, extended coverage, and vandalism
18 insurance for the facility over the life of the lease;

19 --all costs involved in carrying out a City-specified best management practices program
20 involving parking lots, landscaping, erosion control, storm drains, recyclables, and hazardous
21 materials.
22

23 (Roy Decl. Ex. 3, paragraphs 1.07, 1.11, 3.2, 5.02, 6.03, 6.08, 6.12, 7.19 [DE 148].)
24

25 The Scouts have, in fact, by now spent more than \$2 million on building and endowing the
26 Youth Aquatic Center with all of its capital improvements. (Roy Decl. Paragraph 7 [DE148]; Peiser
27 Decl. Paragraph IV(B)(2) [DE148]; Day Decl. Paragraph 19.) Also contributing to these
28 improvements was volunteer work by individual scouts themselves and their parents. They operated

1 under the instruction of the contractors and did such tasks as digging trenches, planting plants, and
2 cleaning up trash. Volunteer Boy Scout mothers also brought food for the crews of construction
3 workers. (Day Decl. Paragraphs 14, 15).

4 Moreover, the Scouts spend tens of thousands of dollars each year to operate and maintain
5 the Youth Aquatic Center. (Roy Decl. Paragraph 7 [DE148]; Peiser Decl. Paragraph IV(B)(2)
6 [DE148]; Day Decl. Paragraph 19.) Over the life of the lease, this will likely amount to around \$2
7 million.

8
9 These facilities, built, operated and paid for by the Scouts, are now open to any youth
10 serving organization on a first come, first served reservation basis. (Roy Decl. Paragraphs 11, 18
11 [DE 148]; Street Dep. at 249:11-15 [DE 149]; Roy Dep. at 66:14-23; McAllister Dep. at 118:16-24;
12 Hughes Dep. at 64:8-18.) The Scouts have never denied anyone use of the facilities for any reason
13 other than a pre-existing reservation. (Roy Decl. Paragraph 11 [DE 148].

14
15 As a result of these policies, the Youth Aquatic Center is now used more by non-Scouting
16 groups than by the Scouts themselves. In the first three quarters of 2002, youth groups other than
17 the Scouts used the facilities on 66% of available days. The Scouts used the facilities on 28% of
18 available days. This is up from 2001 when non-Scouts used the facilities 47% of the time and
19 Scouts used them 30% of the time.

20 Among the youth groups that have used the facility are the Girl Scouts, Camp Fire Boys and
21 Girls, Community in Action, Novaland Sea Adventurers, Red Cross, Junior Life Guards, YMCA
22 Indian Guides and Indian Princesses, University of California, San Diego Camping Club, Granite
23 Hills High School, El Capitan High School, Sea Camp, Rotary Club, Blazing Paddles, Latter Day
24 Saints Young Women, American Canoers Association, City of San Diego Lifeguards, Jamul
25 Community Church, Escondido Cadet Club, Royal Rangers, Drug Education for Youth, youth
26 football groups. (Roy Decl. Paragraph 13, Aguirre Decl. Paragraph 4, Reck Decl. Paragraph 2 [DE
27 148].)
28

1 The value of what the Scouts have provided with this facility is shown by the costs the City
2 bears for other recreational facilities. The City spends more than \$6 million each year on
3 maintenance for the portions of Mission Bay Park that it does not lease to operators like the Boy
4 Scouts. (Christensen Decl Ex. 37 [DE 149]. Moreover, the City recently spent \$2.2 million in
5 capital expenditures to upgrade the public youth campground adjacent to the Scouts' Youth Aquatic
6 Facility. (Plaintiffs' Memorandum at 5; FSS43-47). So the huge funding the Scouts have put into
7 the Youth Aquatic Center open to the public have saved the City and its taxpayers considerable
8 sums.
9

10 Indeed, Plaintiffs' own experts estimate that the value of the property leased by the Scouts on
11 Fiesta Island is "\$1.25 million for a purchaser who will continue to use the property for community
12 purposes." (Plaintiffs' SSUMF, paragraph 48 [DE 153]). But the Scouts have already spent close to
13 twice that on capital expenditures alone for the Youth Center, and more on annual operating and
14 maintenance costs. So the Scouts have already provided more in aid to the City and the general
15 public than the Plaintiffs' own experts say the property is worth.
16

17 But the Plaintiffs' experts have overlooked the undisputed fact that Fiesta Island is
18 permanently dedicated parkland that can be used only for park or recreation purposes open to the
19 public. (Griffith Decl. Paragraph 2 [DE 141]; Griffith Dep. 37:20 – 38:16, 169:15 – 170:3, 170:21-
20 22 [DE 149]; San Diego City Charter, Art. V, Paragraph 55; City Ex. 24 [DE 145].) Such a property
21 has no financial market value. (Griffith Decl. Paragraphs 12, 24 [DE 141]; Griffith Dep. 162:6-
22 164:3 [DE 149]; Peiser Decl. Paragraphs I(1), IV(4) [DE 148]; Peiser Dep. 176:9-25; Dore Dep.
23 17:24 –18:2, 33:19-34:4, 105:11-17 [DE 149].) For what could a private party be expected to pay in
24 purchase or lease payments for a vehicle for providing millions of dollars in public charity for
25 capital improvements and operation and maintenance for a publicly available recreational facility?
26

27 Clearly, then, the City has not provided aid to religion, or any sort of subsidy to the Boy
28 Scouts, through the lease for Fiesta Island. Rather, that lease has been and continues to be a vehicle

1 for the Boy Scouts to provide millions of dollars in charitable aid to the City and its citizens and
2 taxpayers.

3 Of course, the Boy Scouts do enjoy a benefit by being able to use the Fiesta Island facility
4 themselves. But given that that benefit results from a charitable undertaking through which the
5 Scouts provide millions in aid to the City and its taxpayers, it can hardly be considered an
6 unconstitutional aid or benefit to religion. In any event, such benefit is the same as any lessee
7 enjoys from use of the property it has leased, and that kind of benefit has not been seen as creating
8 an unconstitutional establishment of religion. The courts have long held that a religious actor or
9 institution may lease property from a state or local government, even when the property is to be used
10 for worship activities. *See, e.g., Woodland Hills Homeowners Organization v. Los Angeles*
11 *Community College District*, 266 Cal, Rptr. 767 (Cal. Ct. App. 1990); *Christian Science Reading*
12 *Room v. City and County of San Francisco*, 784 F. 2d 1010 (9th Cir. 1986); *Hawley v. City of*
13 *Cleveland*, 24 F.3d 814 (6th Cir. 1994)(at least 17 public airports around the country lease space to
14 private religious organizations to provide chapels).
15
16

17 Indeed, in these cases the religious organization just paid for the cost of its own use of the
18 property in paying fair market rental value under the lease. But in the case of the Fiesta Island lease,
19 the Scouts have effectively paid for costs of use of the property by many others as well in spending
20 millions on capital improvements and operation and maintenance of a facility open to the public and
21 now mostly used by other members of the public.
22

23 Did the City provide a special, unconstitutional benefit to religion by entering into and
24 maintaining the lease with the Scouts despite the City's established policies and the contract's own
25 provisions prohibiting discrimination by lessees? The uncontradicted record shows that the Scouts
26 have never engaged in any sort of discrimination in the public's use of the Fiesta Island facility. As
27 for the Scouts' own internal membership and leadership policies, the Supreme Court has expressly
28 held that the Scouts have a constitutionally protected right to maintain such policies in regard to

1 homosexuals. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Moreover, as this Court has
2 held the Scouts to be a religious organization, they have a constitutionally protected right under the
3 First Amendment to act on their beliefs in their membership and leadership policies. Catholic
4 churches, for example, cannot be forced to appoint atheist Sunday School teachers.

5 Under the doctrine of unconstitutional conditions, the City cannot penalize the Scouts for
6 exercise of their constitutional rights by canceling or denying a lease in retaliation. *Perry v.*
7 *Sinderman*, 408 U.S. 593 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Thomas v. Review*
8 *Board* 450 U.S. 707, 716 (1981); *Healy v. James*, 408 U.S. 169 (1972); *Rutan v. Republican Party*
9 *of Illinois*, 497 U.S. 62 (1990); *Bd. of Comm'rs, Waubensee County v. Umbehr*, 518 U.S. 668
10 (1996); *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *FCC v. League of Women Voters*,
11 *468 U.S. 364* (1984); *Planned Parenthood Federation of America, Inc. v. Agency for Intern.*
12 *Development*, 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991); *Cuffley v. Mickes*, 208
13 *F.3d 702* (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *Anderson v. McCotter*, 100 F.3d 723
14 (10th Cir. 1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908
15 (1993). Consequently, in not canceling or denying the Fiesta Island lease for the Scouts supposed
16 discrimination against homosexuals or atheists, the City was not granting a special aid or benefit to
17 religion, but, instead, complying with constitutional requirements.

18 The Fiesta Island lease, therefore, does not involve any unconstitutional aid or benefit to
19 religion, under either the Federal or California constitutions.

20 **II. The Fiesta Island Lease Was Not the Product of Exclusive** 21 **Negotiations, But of A Maximally Inclusive Process**

22
23
24 This Court held the Balboa Park lease with the Boy Scouts to be an unconstitutional
25 establishment of religion because the Court concluded that it was the product of an exclusive
26 negotiation with a religious institution, thereby favoring religion. But the record indisputably
27
28

1 establishes that the Fiesta Island lease did not involve an exclusive negotiation with the Boy Scouts,
2 but a maximally inclusive process involving all of the active youth groups in the City.

3 The City's youth groups joined together to form the Fiesta Island Youth Facility Committee
4 to ask the City for a lease of Fiesta Island for the purpose of developing a youth aquatic center there.
5 (Ward Decl. Paragraph 6). The youth groups involved in the Committee included the Alpine
6 Community Center, the Boys Club, Vista, the Girls Club, San Deigo, the Amateur Athletic Union,
7 the Boys and Girls Club of Carlsbad, the Girl Scouts, San Diego Imperial Council, the Arrow
8 Center, Boys and Girls Club of Escondido, Interschola, Association of Retarded Citizens, Boys and
9 Girls Club of Fallbrook, Jewish Community Center, Barrio Station, Boys and Girl Club of Imperial
10 Beach, Logan Youth and Family Services, Big Brothers, Boys and Girls Club of Lakeside, No-Way
11 Social Service, Big Sister League, Boys and Girls Club, San Dieguito, Starlight; Boys Club, Chula
12 Vista, Boys and Girls Club of Santee, Strongly Oriented for Action, Boys Club, East County, Camp
13 Fire Council of San Diego County, YMCA, La Jolla, Boys Club, El Cajon, Campus Crusade,
14 YMCA, Palomar, Boys Club, National City, Community Campership Council, YMCA Peninsula,
15 Boys Club, Oceanside, Desert Pacific Council, YMCA of San Diego County, Boys Club, San
16 Diego, Girls Club, Chula Vista, YWCA of San Diego County, Boys Club, San Ysidro, Girls Club,
17 National City, Young Life. (Id.)

18 These groups collaboratively approached the City and designed the lease structure so that the
19 facility would be beneficial for all groups. (Ward Decl. Paragraphs 7-13, Exs. 1,2; Day Decl.
20 Paragraphs 7-8.) Out of these collaborative negotiations, a consensus was reached among the youth
21 groups and the City that the Boy Scouts should be the party to the Fiesta Island lease and be
22 responsible for building, operating and maintaining the facility for the benefit of all. That
23 uncontested conclusion was based on the experience of the Scouts in building, operating and
24 maintaining the Balboa Park facilities, and the inability of any other organization to match the
25 experience and financial capabilities of the Scouts. (Id.).

1 This process could not have been more inclusive. Anyone who was interested was involved,
2 and most of the participants were wholly secular, without any religious affiliation. Consequently,
3 this process could not have involved an unconstitutional establishment of religion.

4 Indisputably, the purpose of the City in entering into the lease was purely secular, to gain the
5 offered financing for first class youth recreation facilities. Just as clearly, the primary effect of the
6 arrangement was not to advance religion, but to advance youth water activities and sports. There is
7 no religious component to the public's use of the facilities, and any religious component in the
8 Scouts' use is financed with their own funds, with no funding coming from the City at all, and as
9 such is itself constitutionally protected. Consequently, the Fiesta Island lease is not unconstitutional
10 under the Federal Constitution.
11

12 Moreover, because the lease arose out of this collaborative process with primarily secular
13 participants, and there is no evidence that religion was ever even a factor in the process, there is no
14 basis for finding a violation of the No Preference Clause of the California Constitution. Calif.
15 Const. Art. I, Section 4. In addition, since, as discussed thoroughly above, the Fiesta Island lease
16 involved no aid to the Boy Scouts from the City, but rather extensive charitable aid from the City
17 from the Boy Scouts, there can be no violation here of the California Constitution's No Aid Clause.
18 Calif. Const. Art. XVI, Sect. 5.
19

20
21 **III. The Fiesta Island Lease Does Not Violate the Equal Protection Rights of the Plaintiffs.**

22 There is no evidence anywhere in the record that the City entered into the Fiesta Island lease
23 with a purpose of discriminating against homosexuals or atheists. Nor is there any evidence of a
24 discriminatory effect as a result of the lease. Neither the Plaintiffs nor anyone else has suffered any
25 discriminatory effect as a result of the lease either. The facilities are open to the public on a first
26 come, first served reservation basis regardless of religion or sexual orientation. Consequently, the
27 Fiesta Island lease cannot possibly involve a violation of the Equal Protection Clause. *Village of*
28

1 *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S.252 (1977); *Personnel*
2 *Adm'r v. Feeney*, 442 U.S. 256 (1979); *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999), *cert.*
3 *denied*, 528 U.S. 1086 (2000).

4 Indeed, as discussed above, *Dale* establishes that the Boy Scouts have a constitutionally
5 protected right to their membership and leadership policies regarding homosexuals. In addition, if
6 the Boy Scouts are a religious organization as this Court has held, then they have a constitutionally
7 protected right to exclude atheists as members and leaders under the First Amendment.
8

9 Therefore, as also discussed above, under the doctrine of unconstitutional conditions the City
10 could not penalize the Scouts for the exercise of these rights by canceling or denying the Fiesta
11 Island lease. So the City's actions in not canceling or denying the Fiesta Island lease to the Scouts
12 because of their alleged discrimination against homosexuals or atheists are actually mandated by the
13 Constitution, and, therefore, could not possibly violate the Equal Protection Clause of the
14 Constitution.
15

16 CONCLUSION

17
18 On the basis of the foregoing, *Amicus Curiae* American Civil Rights Union urges this Court
19 to grant summary judgement to the Boy Scouts in regard to the Fiesta Island lease, and to deny
20 summary judgement to the Plaintiffs in regard to that lease.
21

22 Dated: March 21, 2004

Respectfully Submitted,

23
24 _____
25 PETER J. FERRARA
26 Attorney for
27 *Amicus Curiae*
28 AMERICAN CIVIL RIGHTS UNION
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Certificate of Service

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I, the undersigned, declare as follows:

I am above the age of 18 years, a citizen of the United States, and not a party to this action or proceeding. My business address is 1232 Pine Hill Rd., McLean, VA 22101.

I hereby certify that I have this 22nd day of March, 2004 mailed first class postage prepaid copies of the foregoing Brief of *Amicus Curiae* American Civil Rights Union to the following:

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