No. 08-1222

In The Supreme Court of the United States

BOY SCOUTS OF AMERICA; and SAN DIEGO-IMPERIAL COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

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

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review an interim order of the court of appeals addressing an Article III standing issue prior to that panel resolving the merits issues in the same appeal in a case that does not present any issue of exceptional national importance justifying the grant of immediate review and in which the court of appeals has *sua sponte* stayed the appeal pending this Court's forthcoming decision in *Salazar v. Buono*, No. 08-472.

2. Whether respondents—an agnostic couple and their son and a lesbian couple and their son—have standing to challenge the City of San Diego's leases of public parkland to a local chapter of the Boy Scouts of America, a religious, theistic organization that discriminates in membership and employment on the bases of religious non-belief and sexual orientation, and that teaches that individuals such as respondents cannot be the "best kind of citizen" and are not "morally straight," where respondents would like to make use of the public parkland but avoid doing so because to gain access from the Boy Scouts, they would have to submit themselves to its control while on the parkland, and pay fees to subsidize its message.

3. Whether respondents have standing to challenge the City's leases based on respondents' payments of municipal taxes to the City and the City's expenditures on the Boy Scouts, including money, resources, and below-market rents.

QUESTIONS PRESENTED – Continued

4. Whether respondents have standing to challenge the leases on the basis that the City allows members of the Boy Scouts to have preferential access to the leased public parklands and respondents are ineligible to join or participate in the Boy Scouts and thus have no opportunity to receive such preferential access.

PARTIES TO THE PROCEEDING

The parties are as listed on the caption. Petitioner San Diego-Imperial Council, Boy Scouts of America is identified in the proceedings below as Boy Scouts of America-Desert Pacific Council.

The City of San Diego was a defendant in the proceeding in the district court, but after the district court entered judgment for the plaintiffs-respondents, the plaintiffs and the City settled, and the City did not appeal to the Ninth Circuit. The City of San Diego is thus not a party to the proceeding in this Court.

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BRIEF IN OPPOSITION

The panel below correctly held that respondents have standing to pursue their Establishment Clause claim against the City of San Diego challenging leases between the City and a local chapter of the Boy Scouts of America (BSA). This opinion is consistent with the decisions of this Court and other courts of appeals. Further, the panel's holding is supported by two other grounds, both of which were erroneously rejected by the panel. Thus, even under normal circumstances, *certiorari* would not be appropriate in this case.

This case is in an unusual procedural posture that makes *certiorari* even less appropriate because this appeal is still pending in the court of appeals. Petitioners are seeking *certiorari* before judgment without demonstrating any extraordinary circumstance that would warrant such review. The panel issued an interim order on standing in conjunction with an order certifying certain state law questions to the Supreme Court of California. The panel has not yet reached the merits of respondents' claims, which were fully briefed and argued in the pending appeal along with the standing arguments.

The panel, which still exercises jurisdiction over this appeal, subsequently *sua sponte* issued an order staying all proceedings in the appeal until this Court disposes of this petition *and* this Court issues its standing decision in *Salazar v. Buono*, No. 08-472. App., *infra*, 2a. Thus, the Ninth Circuit has indicated that it will consider arguments that its interim

standing opinion should be revisited in light of *Buono*. Under these circumstances, any action by this Court would be premature as petitioners have the opportunity to prevail on either standing or the merits without intervention by this Court.

STATEMENT

A. FACTUAL BACKGROUND

1. Petitioners' Religious Oath And Purpose Drive Their Discrimination Against Atheistic, Agnostic, And Gay Individuals

Petitioner BSA is a national non-profit organization that describes itself as religious and maintains and enforces policies of excluding from membership and employment individuals who are atheistic or agnostic or gay. The BSA's primary purpose—indeed, the very reason for its existence—is to inculcate its youth members with a specific set of religious values, and it uses recreational facilities and activities for that purpose. ER 2003, 2009.

BSA operates through local, geographically based Councils across the Nation. ER 1999-2000. Petitioner San Diego-Imperial Council, Boy Scouts of America (SDI Council) is the local BSA Council for San Diego and Imperial Counties, California. ER 2000.

Although BSA is not sectarian, Pet. App. 23a, it is a religious, "theistic" organization. Pet. App. 152a; ER 2007. BSA requires each member to know and subscribe to the Scout Oath, ER 1460, which includes

a promise to "do my best * * * [t]o do my duty to God." Pet. 4 n.3; Pet. App. 23a. Duty to God is placed first in the Scout Oath, before duties to country and self, because for the BSA, duty to God is the most important of all Scouting values; it is at the heart of the Scouting movement. Pet. App. 23a; ER 2004. The Scout Law, by which all members must abide, demands of each member that he be "faithful in his religious duties." ER 2005. Duty to God requirements, which may be satisfied by earning religious emblems or performing certain religious observances, are a part of every Scout's advancement up the ranks in the BSA. ER 2009. The BSA has been referred to by many as "the 'sleeping giant of outreach' for local churches," because Scouting programs drive Scouts and their families to the church. Pet. App. 153a; ER 2017.

The BSA excludes from its membership boys and adults who are agnostic or atheistic. ER 2006. Recognition of a duty to God is a condition of membership to the BSA. ER 2004. Indeed, the BSA has litigated vigorously for the right to exclude agnostics and atheists as members. Pet. App. 22a; *see, e.g.*, *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998). Adult membership is restricted to those who accept God "as the ruling and leading power in the universe." ER 2007. Adult leaders are expected to reinforce the value of duty to God, Pet. App. 152a; ER 2017, and they must subscribe to the Declaration of Religious Principle, which states that "no member can grow into the best

kind of citizen without recognizing an obligation to God." ER 2002. And each parent of a prospective Scout must promise to assist his or her son in observing the BSA's policies. Pet. App. 24a.

The BSA also discriminates against people who are gay by excluding from its membership individuals who are "known or avowed homosexuals." ER 2022. The Scout Oath requires each member to keep himself "morally straight." ER 2021. The BSA considers homosexuality to be inherently immoral, and therefore gay youth cannot become Scouts. ER 2021. Gay or lesbian adults are also ineligible to serve as adult volunteer leaders. ER 2024. The BSA has fervently litigated for the right to exclude gay youth and adults from its organization. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

2. The Leases Of Camp Balboa And Fiesta Island

Despite the BSA's widely known policies of discrimination based on religious non-belief and sexual orientation, the City of San Diego entered into a choice arrangement with petitioner SDI Council, whereby the SDI Council leases prime areas of two popular public parks—Balboa Park and Mission Bay Park—for one dollar per year. Pet. App. 24a-25a. The SDI Council uses this public parkland to advance its goals of instilling religious values in its youth membership.

a. Balboa Park is the "urban jewel" of the San Diego park system and is the "Heart of the City." Pet. App. 139a; ER 1965. It is home to fifteen museums, various arts and cultural associations, and the San Diego Zoo, and it offers a host of sports and recreational amenities. ER 1965.

Due to the leases challenged in this case, Balboa Park is also home to the headquarters of the SDI Council. In 1957, the SDI Council entered into a 50-year lease of approximately 16 acres of land within Balboa Park at a yearly rent of one dollar. Pet. App. 139a. While this litigation was ongoing in 2002, that lease was extended for another 25 years at the same dollar-per-year rent plus an annual $2500 administrative fee. Pet. App. 25a.

In the leased area of the public park, the SDI Council erected "Camp Balboa," a unique campground facility in the heart of the dense city. Pet. App. 26a. Camp Balboa offers such amenities as nine camp sites, a swimming pool, an amphitheater, and an archery range. Pet. App. 26a; ER 1317. Camp Balboa is surrounded by a fence and is gated with a sign over the entrance reading, "Boy Scouts of America." ER 360, 1982. BSA emblems and symbols are displayed throughout the property. ER 2893.

The SDI Council also erected its headquarters in Camp Balboa. Pet. App. 26a. The headquarters facility is where the SDI Council administers its $3.7 million annual budget, and approximately 30 SDI

Council employees work there. Pet. App. 26a. About half of the employees at the headquarters are "professional Scouters," who perform functions including sales, service, finance, administration, and public relations. ER 2895-2896. Atheists, agnostics, and gay individuals are ineligible for those positions. ER 3703.

b. Fiesta Island is a waterfront section of the City of San Diego's Mission Bay Park that contains direct access to Mission Bay and the Pacific Ocean. Mission Bay Park is "a unique aquatic recreational resource of major significance and proportions" to residents of San Diego. ER 1969. Fiesta Island contains the Youth Aquatic Center, which offers water-based activities such as kayaking, canoeing, sailing, and other sports, as well as classroom space for youth groups. Pet. App. 26a; ER 1970. Adjacent to the Youth Aquatic Center are dormitories and camping facilities.

The City has leased the SDI Council property at Fiesta Island since 1987 at no charge. Pet. App. 197a. The SDI Council maintains control over the use of Fiesta Island and the Youth Aquatic Center. Affixed to the entrance of the Youth Aquatic Center is a six-foot BSA logo, which reads "Boy Scouts of America." ER 3717.

c. Although the SDI Council is overwhelmingly the primary user of Camp Balboa and Fiesta Island—its use of the Camp Balboa campgrounds makes up

80 to 95 percent of total use, ER 2057, 2620—the SDI Council also makes some amenities at those facilities available to the general public when the public's use does not interfere with Scouting activities. Pet. App. 27a. But the SDI Council manages the reservations of those facilities; thus, a religious organization—the SDI Council—solely controls access to residents' use of public parkland owned by the City of San Diego. *Ibid.*; ER 3717. Moreover, when the general public uses the amenities, it must do so subject to the SDI Council's oversight and control. Pet. App. 27a.

The SDI Council also charges the public fees to use the amenities at Camp Balboa and Fiesta Island. *Ibid.* The revenue is deposited into the SDI Council's general operating fund and is not reserved for administration or upkeep of the properties. Pet. App. 171a. Thus, the fees are used to promote the BSA's purposes of instilling in youth the obligation to observe a duty to God. Consequently, the only way that an atheistic, agnostic, or gay resident of San Diego may access these public facilities is to subsidize both discrimination against them and the spreading of a message that they are immoral and incapable of being the "best kind of citizen." Pet. App. 51a-52a.

The SDI Council also periodically excludes all non-Scouts from facilities at Camp Balboa and Fiesta Island. For a seven-week period each summer, while kids are out of school and thus the facilities are at peak demand, Camp Balboa is closed for a Cub Scout camp. Pet. App. 205a n.7; ER 1412, 1937-1951. Non-Scouts, including agnostics and known or

"avowed[ly]" gay youth, are not permitted to attend that camp. ER 1133. Additionally, the public is never permitted to use the Camp Balboa facility that houses the SDI Council's headquarters. Pet. App. 27a.

The SDI Council is also permitted to reserve up to 75 percent of the Youth Aquatic Center at Fiesta Island up to 7 days in advance. Pet. App. 28a. And for four weeks of the summer each year, Scouts have preferential access to the Youth Aquatic Center for a Scout camp, during which non-Scouts' access is limited to those areas not already exclusively in use by Scouts. Pet. App. 28a.

3. Respondents' Diminished Use And Enjoyment Of The Parklands Leased To Petitioners

Respondents Michael and Valerie Breen are both agnostics—*viz.*, they believe in neither the existence nor non-existence of God. Pet. App. 24a; ER 83. As such, they are ineligible to participate as volunteers or members of the BSA. Pet. App. 24a; ER 2006. The Breens will not permit their son Maxwell to become a member of the BSA because that organization discriminates on the basis of religious non-belief and teaches its youth members that religious belief is necessary to the development of good character and citizenship, contrary to what the Breens teach their son at home. Pet. App. 24a; ER 83.

Respondents Lori and Lynn Barnes-Wallace are a lesbian couple who are in a long-term, committed

relationship, Pet. App. 24a; ER 368—or in the BSA's parlance, they are "avowed homosexuals." As such, they likewise are not permitted to serve as leaders or volunteers in the BSA. Pet. App. 24a; ER 2022. The Barnes-Wallaces, understandably, will not apply for their son Mitchell to join the BSA because they refuse to have him subjected to the message that his family is immoral or wrong because of their sexual orientation. ER 368.

The Breens and Barnes-Wallaces are residents and taxpayers of the City of San Diego. ER 2032, 2035. They and their children have made extensive use of other portions of Balboa and Mission Bay Parks, and they enjoy many of the amenities offered there, including Balboa Park's zoo and museums and Mission Bay Park's beaches. ER 83-84, 368-370.

The families would also like to make use of the unique amenities offered in the areas of the public parks that the SDI Council controls—Camp Balboa and Fiesta Island. Pet. App. 29a; ER 84-86, 369-371. For example, the Barnes-Wallaces would like their children to participate in a public day camp program during the summer at Balboa Park. ER 369-370. And the Breens would like to have their children participate in a water-safety and lifeguarding program at the Youth Aquatic Center on Fiesta Island. ER 2825.

But in order to use Camp Balboa or Fiesta Island, the families would have to pay a fee to an organization whose very purpose is to teach youth

that agnostics such as the Breens are not ideal citizens, ER 2002-2003, and that lesbians such as the Barnes-Wallaces are immoral, ER 2021. The families refuse to financially support an organization that teaches those values and that actively discriminates on the bases of religious non-belief and sexual orientation. ER 85, 371.

They also refuse to visit Camp Balboa and Fiesta Island because they would have to go through the BSA to gain access and would have to submit themselves to the dominion and control of the BSA while there. Pet. App. 29a, 32a-33a. Consequently, the Breens and the Barnes-Wallaces actively avoid the City-owned public parkland. Pet. App. 29a.

B. Proceedings Below

1. Respondents Breens and Barnes-Wallaces sued the City of San Diego and petitioners BSA and the SDI Council, seeking declaratory relief and a permanent injunction barring the City from continuing to lease the parklands to the BSA and the SDI Council. ER 604.

Respondents alleged that the leases violated the Establishment Clause of the federal Constitution. Although the questions presented ask only whether respondents have standing to bring an Establishment Clause claim, respondents pursue other claims as well. The families bring claims under the "No Preference" clause of the California Constitution—which provides,

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed," Cal. Const. art. I, § 4—and the "No Aid" clause of the California Constitution—which prohibits state and local governments from making any appropriation or grant "in aid of any religious sect, church, creed, or sectarian purpose," *id.* art. XVI, § 5. Additionally, the families allege that the leases violate the Equal Protection Clauses of both the U.S. and California Constitutions, as well as state statutory and common law. ER 602-603.

2. The district court held that respondents had standing as municipal taxpayers to bring all of their claims. Pet. App. 216a. On summary judgment, the court ultimately concluded that the leases violated the Establishment Clause of the U.S. Constitution and the No Preference and No Aid Clauses of the California Constitution. Pet. App. 134a, 193a. The court did not decide whether the leases violated the Equal Protection Clauses but instead dismissed that claim as moot. Pet. App. 134a. The court ruled against respondents on the remaining state law claims on state law grounds. Pet. App. 193a.

The district court enjoined the leases and ordered them terminated. Pet. App. 30a; ER 3761. That injunction was not stayed pending appeal. Pursuant to a provision added to the Balboa Park lease when it was renewed in 2002, providing that the lease would terminate immediately if any court enters a final judgment requiring its termination, ER 804, the City issued a notice terminating the lease, Pet. App. 30a;

SER 1290. But it permitted the SDI Council to retain possession under a month-to-month holdover tenancy until the appeals are resolved, Pet. App. 30a-31a; SER 1290-1291. That termination notice will "no longer be effective" if petitioners prevail on appeal. SER 1291. Thus, the City has declared that it will abide by the final order that ultimately results from this litigation.

The BSA and the SDI Council appealed. The City of San Diego settled with the plaintiffs and did not appeal. Pet. App. 31a.

3. After full briefing and oral argument, a divided panel of the Ninth Circuit issued an interlocutory order in which it concluded that respondents have standing to bring all their claims (although premised on a different theory from that of the district court) and also certified questions of state law to the Supreme Court of California. Pet. App. 19a-68a.

The panel held that respondents have suffered "both personal emotional harm and the loss of recreational enjoyment, resulting from the Boy Scouts' use and control" of the land. Pet. App. 35a.[1]

[1] The panel initially concluded that respondents had standing because their right to access the facilities is not equal to that of BSA members. Pet. App. 83a-84a. On petitioners' petition for rehearing, the panel modified its order and held that respondents have standing based on their loss of recreational enjoyment.

The court relied on the respondents' undisputed averments that "they would like to use Camp Balboa and the Aquatic Center, but that they avoid doing so because they are offended by the Boy Scouts' exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics." Pet. App. 32a. Respondents cannot access the land without gaining approval from and submitting themselves under the "dominion and control of an organization that openly rejects their beliefs and sexual orientation." Pet. App. 34a. And even if they did access it, their enjoyment would be diminished by having to view "symbols of [the BSA's] presence and dominion" on the land. Pet. App. 32a.

Thus, the panel determined that respondents had averred much more than psychological harm from observing remote conduct with which they disagreed. Pet. App. 33a. The leases "interfere[ ] with their personal use of the land," Pet. App. 33a, and thus, the plaintiffs "have alleged a concrete recreational loss," Pet. App. 34a.

To avoid deciding the federal constitutional questions, the court of appeals considered whether the leases violated the California Constitution, but it did not discern any precedent that would definitively resolve the state constitutional claims. Pet. App. 40a-41a. Accordingly, the panel certified three questions of state law to the Supreme Court of California. Pet. App. 20a-21a.

Judge Berzon wrote a concurring opinion in which she concluded that the families have standing

because "requiring plaintiffs to deal with the Scouts in order to use Camp Balboa and the Mission Bay Park Youth Aquatic Center results in an injury which, in fact, is very real." Pet. App. 50a. The "Scouts exclude people like the Breens and Barnes-Wallaces, because the Scouts believe them to possess characteristics that make them morally unclean and incapable of being the 'best kind of citizen.' " Pet. App. 51a. Thus, to use the public facilities, "the Plaintiffs must not just *observe* the presence of the Boy Scouts, but also interact with, seek permission from, and quite significantly, pay fees to this same organization that believes them inferior in both morals and citizenship." Pet. App. 52a. Judge Kleinfeld dissented from the panel's order. Pet. App. 56a-68a.

The Ninth Circuit denied petitioners' petition for rehearing *en banc* of the panel's interlocutory order. Pet. App. 3a.

4. On April 1, 2009, after this petition for *certiorari* was filed, the Supreme Court of California denied the Ninth Circuit's request to decide questions of state constitutional law. The order specified that the denial was without prejudice and that the questions could be recertified to that court "after the issue of standing is finalized." App., *infra*, 3a.

5. On May 15, 2009, the Ninth Circuit panel *sua sponte* stayed its proceedings pending the determination of both (1) the petition for *certiorari* in this case pertaining to the panel's interlocutory

order and (2) the decision of this Court in *Salazar v. Buono*, No. 08-472. App., *infra*, 2a.

REASONS THE PETITION SHOULD BE DENIED

The Ninth Circuit has not yet issued its judgment in this case. In fact, the court of appeals' interlocutory decision concluding that respondents have standing to pursue their claims is not necessarily even the panel's final word because that court has stayed its proceedings until this Court's decision next Term in *Salazar v. Buono*, No. 08-472, another case involving Article III standing, and has thereby indicated that it is open to revisiting its standing holding in light of *Buono*. Thus, it would be a waste of this Court's resources to grant *certiorari*. Moreover, there is no compelling reason for this Court to depart from the normal review process and grant review immediately, in piecemeal fashion, rather than await the court of appeals' judgment.

Furthermore, the court of appeals' holding that respondents have standing was correct and does not conflict with the holdings of any other circuit. Respondents have suffered an injury in fact because they would like to access the public facilities that the City of San Diego has placed within petitioners' control, but they cannot do so without subjecting themselves to the dominion and control of an organization that discriminates against them, which they reasonably refuse to do. Nor will they pay a fee

to petitioners, and thereby support petitioners' discriminatory conduct and message, even though fees are a prerequisite for them to use the Camp Balboa and Fiesta Island facilities. This loss of recreational enjoyment is a sufficient injury in fact for standing, as this Court held in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000).

This Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), is not to the contrary, because respondents are not far-off observers. Respondents are, instead, personally affected by the City of San Diego's decision to lease public parklands to the SDI Council and the erection of what amounts to a toll payable to a discriminatory, religious organization to use public property.

Nor does the Ninth Circuit's decision conflict with the decisions of other courts of appeals. None of the decisions that petitioners rely on to establish a purported conflict is on point because none of them involves a personal injury such as the loss of recreational enjoyment of public land that exists here.

Finally, review of this case is inappropriate because respondents also have standing as municipal taxpayers, and because the leases give preferential access to the public parkland to Scouts over non-Scouts and petitioners cannot become Scouts because of petitioners' policies.

A. PETITIONERS HAVE MADE NO SHOWING THAT THIS CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE TO JUSTIFY *CERTIORARI* BEFORE JUDGMENT

1. As noted above, the very appeal from which petitioners seek review is still pending in the court of appeals. The panel issued an interim ruling on standing to assure itself that it had the authority to solicit an opinion from the Supreme Court of California regarding the California Constitution. That effort having failed, the appeal is still in the Ninth Circuit. At no point did the Ninth Circuit issue a judgment.

This Court's Rules provide that a petition for *certiorari* before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. The Court's exercise of its power to grant *certiorari* before the court of appeals issues its judgment is an "extremely rare occurrence." *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers).

Petitioners simply ignore the fact that their petition asks this Court to take the extraordinary step of granting *certiorari* before judgment. They do not even attempt to establish the required "showing" under this Court's Rule 11, because they have no basis on which to do so. The holding of the panel below is fact-intensive and is not of general public importance. There is nothing about the decision

below that justifies the Court's immediate intervention and deviation from the normal practice of giving the court below an opportunity to pass judgment on the entire appeal first.

2. That Ninth Circuit panel, exercising its authority over the pending appeal, recently issued an order *sua sponte,* stating that it will not act on the merits questions or otherwise until this Court issues its decision next Term in *Salazar v. Buono*, No. 08-472, which involves Article III standing. App., *infra*, 2a. Although respondents do not believe that the panel's conclusion regarding standing would be altered by *Buono*, the Ninth Circuit is apparently open to revisiting its holding in light of *Buono*. Thus, there is no reason to hold this case pending *Buono*, as petitioners suggest, Pet. 24, because the Ninth Circuit has indicated that it may revisit its standing decision after *Buono* is handed down.

If the court of appeals were to either reverse its standing holding in light of *Buono* or to adhere to its standing holding but rule for petitioners on the merits in this appeal, that would obviate any need for this Court to hear petitioners' standing challenge. And if the panel adheres to its conclusion that respondents have standing and rules in their favor on the merits, petitioners will still be able to raise the issue of standing in a later petition, after the court of appeals has issued its judgment. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

Thus, the normal rule that the interlocutory nature of a court of appeals' decision is "a fact that of itself alone furnish[es] sufficient ground for the denial" of *certiorari*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), is enhanced when the court of appeals itself takes steps to ensure that it will be able to incorporate potentially new case law developments. There is no ground for hearing this case in a piecemeal fashion.

Because the interlocutory decision below is not yet finalized, and there is no compelling reason to grant *certiorari* before judgment, *certiorari* should be denied.

B. Review Is Not Warranted Because The Court Of Appeals' Ruling That Respondents Have Suffered A Redressable Injury In Fact Was Correct And Does Not Conflict With The Precedent Of This Court Or Any Other Court Of Appeals

1. The court of appeals correctly ruled that respondents have standing resulting from their loss of recreational enjoyment

As the court of appeals held, the City's leases of Camp Balboa and Fiesta Island to petitioner SDI Council interferes with respondents' use and enjoyment of that public parkland. Their loss of recreational enjoyment is a sufficient injury in fact to demonstrate standing to bring their Establishment Clause claims.

a. Respondents proffered detailed, undisputed declarations in which they averred that they have used other portions of Balboa Park and Mission Bay Park extensively and would very much like to have their families use the campgrounds at Camp Balboa and the Youth Aquatic Center at Fiesta Island. ER 83-86, 368-372. As the court of appeals recognized, the families cannot use that public parkland unless they gain access from a discriminatory, religious organization whose primary purpose is to instill values in youth that agnosticism is incompatible with being the "best kind of citizen" and that would not permit them, as agnostics and "avowed homosexuals" to participate in their organization. Pet. App. 32a-33a, 51a. If respondents were to use the campgrounds and Youth Aquatic Center, they would be subject to that organization's control, would have to view symbols of its belief system, interact with its representatives, and be subject to its judgment that they are immoral and unclean. Pet. App. 33a-34a. Thus, if petitioners are correct that the City's action in leasing those properties to the SDI Council violates the Establishment Clause (or the No Aid and No Preference Clauses of the California Constitution), they have established that this unconstitutional conduct personally interferes with the families' use and enjoyment of the public parkland.

Petitioners do not contest the genuineness of the offense that the families take toward their teachings and policy of discrimination. Nor do petitioners contest the reasonableness of the families' avoidance

of the property on that basis. As Judge Berzon stated in her concurrence, "[t]o *not* take serious offense from such characterizations" of the families as "morally unclean and incapable of being the 'best kind of citizen'" "would require a better sense of humor than most of us possess." Pet. App. 51a. Instead, petitioners argue that the families lack standing because they have not taken the step of actually visiting the facilities and submitting themselves to the control of the BSA and the SDI Council.

But there is no salience to that argument. Impairment of aesthetic and recreational interests in the use of land is without question sufficient to confer standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). And this Court held in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000), that avoidance of public land because of the defendant's conduct is sufficient injury to confer standing where the plaintiffs are within the class of individuals who would otherwise enjoy the land.

Indeed, the evidence that the Court held was sufficient to establish standing in *Friends of the Earth* is strikingly similar to the respondents' declarations in this case. The *Friends of the Earth* plaintiffs averred that they lived near the North Tyger River and would like to fish, hike, camp, and picnic along the river but avoided doing so because

they were concerned that the river was polluted because of the defendant's conduct. *Id.* at 181-183. "Those sworn statements," the Court concluded, "adequately documented injury in fact," *id*. at 183, because they demonstrated that the defendant's conduct "directly affected those affiants' recreational, aesthetic, and economic interests," *id.* at 184. *See also id.* at 183 ("[P]laintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))).

This Court in *Friends of the Earth* did not require the plaintiffs to engage in the pointless and potentially dangerous exercise of wading into the river and experiencing the effects of the pollution; it was enough that the plaintiffs desired to enjoy the public land but avoided doing so out of concerns about pollution. Likewise, here, it would be fruitless to require the Barnes-Wallaces and the Breens to visit Camp Balboa and Fiesta Island. Their injury is that they cannot visit these otherwise public parklands without experiencing the effects of the violations of the Establishment, No Aid, and No Preference Clauses.

b. Petitioners also argue that respondents do not have standing because they would not be exposed to any religious symbols such as crosses or menorahs

at the properties. Pet. 19. But this argument is a red herring. Petitioners essentially contend that, *on the merits*, the Establishment Clause is not violated because the public is not subjected to overt religious conduct such as displays of crosses or compelled prayer. But at the standing stage, petitioners must negate respondents' showing that assuming, *arguendo*, there is a constitutional violation, respondents were not injured.

Furthermore, petitioners ignore the fact that under the lease arrangements, in order for non-Scouts to use public, City-owned facilities, they must pay fees to a self-described religious, theistic organization whose mission is to instill in youth the value of duty to God. The use fees are not segregated into a separate account earmarked for maintenance and upkeep of the facilities; instead they are deposited into the SDI Council's general operating fund. Pet. App. 171a.

In effect, then, the City of San Diego has erected a toll that the public must pay to the SDI Council in order to use City-owned parkland. Even individuals who are ineligible to join the BSA or who do not wish to support the BSA's theistic message must nonetheless do so to gain access to and use public property. As the district court put it, "[i]ndividuals not eligible for membership in the Boy Scouts, including agnostics and atheists [and gays], have the take-it-or-leave-it option of forgoing use of public

parkland or paying usage fees to the discriminatory organization" in order to access it. Pet. App. 171a n.3.

Such compelled collection of tariffs to support an institution whose purpose is to promote theism goes to the heart of what the Establishment Clause precludes. *See Locke v. Davey*, 540 U.S. 712, 722 (2004) ("procuring taxpayer funds to support church leaders * * * was one of the hallmarks of an 'established' religion"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (Establishment Clause protects "the right not to 'contribute three pence * * * for the support of any one [religious] establishment.'" (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (internal quotation marks omitted))); *Flast*, 392 U.S. at 104 ("The Establishment Clause was designed as a specific bulwark against" the use of government's "taxing and spending powers * * * to aid religion in general."). The injury to respondents here is all the more significant because they are being denied use of public parkland, which has "immemorially been held in trust for the use of the public." *Hague v. Committee for Indust. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

c. Additionally, as the court of appeals concluded, respondents' injury would likely be redressed by the relief they seek. Pet. App. 35a. Respondents' injury is that they cannot use public parkland without gaining access from and paying fees to the SDI Council. The redress that they seek is a declaration that the leases violate the federal and state constitutions and a

permanent injunction precluding the City from further leasing the parklands to the SDI Council.[2] Petitioners do not contest that the declaratory and injunctive relief that the plaintiffs seek would redress their injury, because it would end the SDI Council's control over the leased public parklands. That alone—the existence of an injury in fact that is likely to be redressed by the relief sought—is sufficient to establish standing. *INS v. Chadha*, 462 U.S. 919, 936 (1983); *Duke Power Co.*, 438 U.S. at 79.

Instead, petitioners seek to alter the Article III standing question to impose on top of the requirement that the relief requested be likely to redress the injury an additional requirement that there be a sufficient subject-matter nexus between a defendant's constitutional violation and the plaintiffs' injury. Thus, petitioners argue that the "constitutional violation found by the district court was the City's lack of a competitive bidding process in

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[2] Petitioners' assertion that the plaintiffs "sued to require the City to lease to another nonprofit that is more acceptable to them," Pet. 5, misstates the record. Petitioners cite to portions of the plaintiffs' deposition transcripts wherein the plaintiffs testified that they might or might not have objections if the City were to lease Camp Balboa and Fiesta Island to a different non-profit organization, depending on that organization's teachings and membership policies. The remedies that plaintiffs actually seek in this action are (1) a declaration that the leases violate the federal and state constitutions and (2) "a permanent injunction prohibiting defendant City * * * from continuing to lease to defendant [SDI Council] the public parklands at issue." ER 604.

awarding the leases,"[3] and that the respondents lack standing because "[c]uring the alleged constitutional violation would not redress [respondents'] claimed injury." Pet. 20.

But outside the context of federal taxpayer standing, this Court long ago rejected petitioners' suggested subject-matter nexus requirement. *See Duke Power Co.*, 438 U.S. at 79 (rejecting the argument that standing requires a "subject-matter nexus between the right asserted and the injury alleged").[4] The only requirement, which is met here, is a likelihood that the challenged conduct (*i.e.*, the leases) will be

[3] The district court reasoned that the fact that the City of San Diego entered into exclusive negotiations with the SDI Council and did not consider any other non-profit organizations to manage the City-owned parklands was a significant factor in favor of an Establishment Clause violation. But the district court did not order the City to engage in a competitive-bidding process; the court ordered the leases terminated.

[4] In *Duke Power Co.*, the plaintiffs claimed that the Price-Anderson Act—which imposed a cap on liability for nuclear accidents resulting from the operation of federally licensed nuclear power plants—violated the Due Process Clause of the Fifth Amendment by eliminating adequate compensation to the victims of nuclear accidents. 438 U.S. at 67-68. Rejecting the subject-matter nexus requirement that petitioners here request, this Court held that the plaintiffs could challenge the Price-Anderson Act on due process grounds, even though their injury in fact was not the potential lack of adequate compensation because of the liability cap, but was the environmental and aesthetic consequence resulting from the erection of nearby nuclear power plants that would not have been built had the Price-Anderson Act not been enacted. *Id.* at 74.

redressed by the requested relief (*i.e.*, declaratory and injunctive relief). "We * * * cannot accept the contention that, outside the context of [federal] taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Ibid*.[5] The particular legal theory under which the district court found petitioners to have violated the Establishment Clause is irrelevant to the families' standing.

2. The ruling below does not conflict with this Court's precedent in *Valley Forge*

The court of appeals carefully considered and correctly rejected petitioners' contention that respondents lacked standing under this Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

As the court of appeals rightly stated, Pet. App. 35a, the plaintiffs in *Valley Forge* were residents

[5] Thus, contrary to petitioners' assertion, Pet. 20 n.6, respondents Barnes-Wallaces need not object to the lease on religious grounds in order to have standing to allege that petitioners violate the Establishment Clause. Because respondents Barnes-Wallaces' injury is the existence of the leases and the resulting effect on their recreational enjoyment, and that injury would likely be redressed by the relief they requested, they have a sufficiently personal stake in the outcome of this litigation to establish an Article III case or controversy.

of Maryland and Virginia who complained about a transfer of property from the federal government to a religious institution in Chester County, Pennsylvania, after learning about the transfer from a news release. 454 U.S. at 486-487. There was no allegation or evidence that the plaintiffs had ever seen the transferred property, had any desire to visit it, or suffered any "*personal* injury" from the transfer apart from "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485 (emphasis added).

In stark contrast, the Breens and Barnes-Wallaces "can hardly be characterized as individuals who 'roam the country in search of governmental wrongdoing.'" Pet. App. 35a (quoting *Valley Forge*, 454 U.S. at 487). They live in San Diego, frequent the parks at issue, and "have expressed a desire to make *personal* use of the facilities operated by the [SDI] Council." *Ibid.* (emphasis added). Unlike the plaintiffs in *Valley Forge*, respondents are not merely bystanders who have purely ideological disapproval of remote government conduct. Pet. App. 36a. As the court below correctly held, "[t]he plaintiffs' *personal* interest in the land at issue, and the *personal* nature of their objection to the Scouts defendants' use of the land, take this case outside of the scope of *Valley Forge*." *Ibid* (emphases added).

Moreover, petitioners are wrong to suggest, Pet. 16, 18, that *Valley Forge* held that psychological injury or the feeling of personal offense is never a sufficient injury for standing purposes. Indeed, the

Court in *Valley Forge* emphasized that the case was not to be read as petitioners suggest, stating: "[W]e do not retreat from our earlier holdings that standing may be predicated on noneconomic injury." 454 U.S. at 486 (citing *United States v. SCRAP*, 412 U.S. 669, 686-688 (1973); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-154 (1970)). Instead, the Court held in *Valley Forge* that the plaintiffs lacked standing not because their injury was psychological but because they had not "alleged an *injury* of *any* kind, economic or otherwise" that was sufficiently personal and concrete to confer standing. *Ibid.*; *cf. Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994) (damages for "emotional injury caused by fear of physical injury" are available to employee under Federal Employers' Liability Act even without any separate showing of physical injury).

3. The court of appeals' decision does not create a split among the circuit courts of appeals

Contrary to petitioners' assertions, the Ninth Circuit's decision is in harmony with the decisions of the Third, Fifth, and D.C. Circuits.

The plaintiffs in *ACLU-NJ v. Township of Wall* challenged holiday displays that their township erected near the entrance of the town's main municipal building in 1998 and 1999. 246 F.3d 258, 260-261 (3d Cir. 2001). The plaintiffs proffered

evidence that they viewed the 1998 holiday display, interpreted it as a government endorsement of the Christian religion, and were offended by it. *Id.* at 264-265. In an opinion written by then-Judge Alito, the Third Circuit opined that the plaintiffs' "evidence [of injury] might be sufficient to establish standing with respect to the 1998 display." *Id.* at 265. The court, like the Ninth Circuit in this case, read *Valley Forge* as requiring an injury that is sufficiently personal rather than remote. *Ibid.* ("unlike the named plaintiffs in *Valley Forge*, the Millers had personal contact with the display"). But the Third Circuit did not decide whether the plaintiffs had standing to challenge the 1998 display, because the plaintiffs dropped their challenge to that display on appeal. *Id.* at 266.

The Third Circuit's holding that the plaintiffs did not proffer sufficient evidence to establish standing with regard to the 1999 display, *ibid.*, is consistent with the Ninth Circuit's decision below. The 1999 display was materially different from the 1998 display, *id.* at 260, but one of the plaintiffs never viewed the 1999 display, and the other plaintiff's view of it may have been just for purposes of the litigation, *id.* at 266. Moreover, unlike the instant case, the plaintiffs in *Township of Wall* never alleged that they avoided the municipal building because of the displays or that the township required citizens to pay a fee to a religious organization to access any city property. Thus, with regard to the 1999 display, the plaintiffs had no personal injury.

Likewise, the Ninth Circuit's decision here is in accord with the Fifth Circuit's holding in *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (en banc). The court in *Doe* held that the plaintiff lacked standing to challenge invocations at public school board meetings because there was no evidence that the plaintiff had attended any meeting at which an invocation had been given. *Id.* at 497. Unlike this case, there was also no evidence in *Doe* that the plaintiff wanted to attend a school board meeting but refused to do so because of the invocations given at the meetings. And, of course, there was no evidence that the school board required payment of fees to a discriminatory, religious organization to attend a school board meeting. Either of those facts, present here, would have easily been sufficient to confer standing in *Doe*. Indeed, the Fifth Circuit has held, like the Ninth Circuit here, that "[p]laintiffs have standing to assert, for example, that their use or enjoyment of a public facility is impaired by an alleged violation of the Establishment Clause." *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001) (en banc).

And the Ninth Circuit's decision is in harmony with *In re Navy Chaplaincy*, 534 F.3d 756, (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1918 (2009). The plaintiffs in that case, Protestant Navy chaplains who complained that the Navy Chaplaincy's retirement system discriminated in favor of Catholic chaplains, admitted that they were not personally affected by any such discrimination. *Id.* at 759-760. The

plaintiffs' only alleged injury was the knowledge "that *other* chaplains suffered such discrimination." *Id.* at 760. The Navy chaplains alleged that they disagreed with the "message" sent by the alleged discrimination and argued erroneously that injury-in-fact standing was automatically conferred whenever there was an Establishment Clause violation, something that the Ninth Circuit rejected below. *See* Pet. App. 35a-36a. Like the D.C. Circuit, the ruling below held that plaintiffs' injuries must be *personal*. Pet. App. 36a.

Finally, the decision below is in harmony with decisions from the Seventh and Eleventh Circuits. *See ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 267-268 (7th Cir.) (Posner, J.) (plaintiffs have standing to challenge lighting of cross on public land "where plaintiffs were so offended by the lighted cross that they departed from their accustomed routes of travel to avoid seeing it"), *cert. denied*, 479 U.S. 961 (1986); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103-1104, 1108 (11th Cir. 1983) (plaintiffs who regularly camp in state park have standing to challenge display of cross on parkland because they avoid use of the land while the cross is there).

C. Review Is Not Warranted Because Respondents Have Standing Under Other Theories

In addition, the district court had jurisdiction under Article III to adjudicate respondents' claims against the City of San Diego, challenging the leases

of City land to petitioners, on two other bases. These alternative grounds for sustaining standing would pose substantial obstacles to this Court's reaching petitioners' questions presented.

1. Respondents had standing to sue the City as municipal taxpayers

Respondents pay taxes to the City of San Diego, the entity responsible for entering into the leases with petitioners. The City, in turn, has not only leased the properties to petitioners in essence rent free (thus subsidizing petitioners and depriving the City treasury of an equal amount of money), but also provided them monetary grants and resources (*i.e.*, free water). Pet. App. 214a-216a. These facts are sufficient to establish respondents' standing as municipal taxpayers to challenge the City's conduct.

This Court has consistently recognized that, unlike federal taxpayers, there is a longstanding history of permitting municipal taxpayers to sue municipalities to prevent unlawful expenditures *or* a "misuse of corporate powers." *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879). "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases, and is the rule of this Court." *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923).

The Ninth Circuit erroneously read this Court's decision in *DaimlerChrysler Corp. v. Cuno*, 547 U.S.

332 (2006), as extinguishing municipal taxpayer standing. Pet. App. 37a. But *Cuno* simply held that the same general rules that barred federal taxpayer standing also extended to bar state taxpayer standing. The Court expressly did not question the distinct case law sustaining municipal taxpayer standing and reaffirmed that the "*Frothingham* Court noted with approval the standing of municipal residents to enjoin the 'illegal use of the moneys of a municipal corporation.'" 547 U.S. at 349 (quoting 262 U.S. at 486-487); *see also Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 600 n.9 (7th Cir. 2007) ("municipal taxpayer challenges to municipal actions" after *Cuno* "are not subject to the same stringent standing requirements as state and federal taxpayers seeking to challenge state and federal actions, respectively"); *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1280 (11th Cir. 2008) (Pryor, J.) ("The standing of municipal taxpayers to challenge, as unconstitutional, expenditures by local governments remains settled law."); *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, No. 07-2398, 2009 WL 1478961, at *4 (6th Cir. May 28, 2009) ("so long as the challenged government action involves the expenditure of municipal funds (or the loss of municipal revenue), *Frothingham's* bar on taxpayer suits does not apply").

Unlike the burden on state taxpayers identified in *Cuno*, there is no requirement for municipal taxpayers to establish that the municipal fisc has been depleted (although there is sufficient evidence

of that in this case). Instead, it is sufficient that respondents can establish that their municipal corporation is engaged in unlawful expenditures. Such a distinction is based not only on the fact that municipalities generally have smaller populations than States (and thus the expenditures are more likely to have concrete effects on individual taxpayers), but also on the distinct historical roots of municipal corporations compared to sovereign entities such as States and the federal government. "Since colonial times, a distinct feature of our Nation's system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980). These municipal corporations were treated "like private corporations" "for virtually all purposes of constitutional and statutory analysis." *Id*. at 639; *see Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003) ("municipal corporations and private ones were simply two species of 'body politic and corporate,' treated alike in terms of their legal status"). Thus, state courts and this Court have held that a municipal taxpayer suit is not just based upon economic injury to the taxpayer but also "upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Frothingham*, 262 U.S. at 487.

Respondents' standing to challenge the City's conduct therefore can be sustained based on

respondents' payments of municipal taxes and the City's expenditures of money, resources, and below-market rents on the Boy Scouts.

2. Respondents are injured because the leases give preferential access to members of the public who, unlike respondents, are eligible to join or participate in the BSA

Respondents also have standing because the SDI Council gives preferential access to Camp Balboa and Fiesta Island to Scouts over non-Scouts, and respondents, consistent with petitioners' intent, are not eligible to join or participate in the BSA and receive that preferential access.

The SDI Council permits the public to use Camp Balboa only when the public's use does not conflict with scheduled Scouting functions. Pet. App. 183a. During periods of high demand, the SDI Council may reserve areas of the parklands in advance, effectively precluding access by the general public. *Ibid*. During a six-to-eight-week period each summer, the SDI Council closes off the Camp Balboa campgrounds during a Scouts-only camp. Pet. App. 184a. Indeed, copies from the Camp Balboa reservation book prove that the SDI Council periodically monopolizes use of the campgrounds. *Ibid*; ER 1937-1951. The Fiesta Island facility is also unavailable to non-Scouts for at least four weeks each summer during a day camp. Pet. App. 185a. And unlike non-Scouts, Scouts have

the ability to reserve up to 75 percent of Fiesta Island's aquatic facilities seven days in advance. Pet. App. 183a.[6]

Respondents are thus injured because, as individuals who are ineligible to join or participate in the BSA, they do not have the same access to the parkland as members of the public who are eligible to join or participate in the BSA. They are denied both equal treatment and the benefits of the parkland. *Cf. Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' * * * is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). That injury would likely be redressed by plaintiffs' requested relief—declaratory and injunctive relief precluding the City from leasing the parklands to the SDI Council—because there is a substantial likelihood that the parkland would be operated by an organization that does not discriminate in its membership on the bases of religious non-belief and

[6] Despite uncontested evidence establishing preferential access, the district court on cross-motions for summary judgment concluded that the extent to which the SDI Council has exclusive or preferential access of the parkland is disputed, Pet. App. 183a, 187a, as did the court of appeals, Pet. App. 39a. Respondents respectfully disagree with that reading of the record. But even if there were a material dispute of fact, it would simply mean that if petitioners prevailed on their standing argument, the case would be remanded to the district court for a factual determination on the issue of preferential access, to determine whether respondents have standing under this theory.

sexual orientation. *Cf. Clinton v. City of N.Y.*, 524 U.S. 417, 433-434 n.22 (1998) ("denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result," and that injury "would be redressed by a declaratory judgment that the cancellations [that caused the denial] are invalid").

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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JUNE 3, 2009

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MITCHELL BARNES-WALLACE; MAXWELL BREEN, *Plaintiffs-Appellees*, v. CITY OF SAN DIEGO, *Defendant*, and BOY SCOUTS OF AMERICA—DESERT PACIFIC COUNSEL, *Defendant-Appellant*.	No. 04-55732 D.C. No. CV-00-01726-NAJ/AJB Southern District of California, San Diego
MITCHELL BARNES-WALLACE; MAXWELL BREEN; LORI BARNES-WALLACE, Guardian Ad Litem; LYNN BARNES-WALLACE, Guardian Ad Litem; MICHAEL BREEN, Guardian Ad Litem; VALERIE BREEN, Guardian Ad Litem, *Plaintiffs-Appellants*, v. CITY OF SAN DIEGO; BOY SCOUTS OF AMERICA—DESERT PACIFIC COUNSEL, *Defendants-Appellees*.	No. 04-56167 D.C. No. 3:00-CV-01726-J-AJB Southern District of California, San Diego ORDER

Filed May 15, 2009

Before: William C. Canby, Jr., Andrew J. Kleinfeld, and Marsha S. Berzon, Circuit Judges.

ORDER

On April 1, 2009, the California Supreme Court denied this court's request for decision of certified questions without prejudice to renewal of the request after resolution of the issue of standing becomes final. Accordingly, further proceedings in this court are stayed pending the final determination of the Supreme Court of the United States of the petition for certiorari filed by the Defendants-Appellees on March 31, 2009 (Sup. Ct. Docket No. 08-1222), and pending the decision by the Supreme Court of *Buono v. Salazar,* No. 08-472, cert. granted, Feb. 23, 2009.

APPENDIX B

9th Cir. Nos. 04-55732/04-56167
S169465

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MITCHELL BARNES-WALLACE et al.,
Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO, Defendant;

BOY SCOUTS OF AMERICA—
DESERT PACIFIC COUNCIL,
Defendant and Appellant.
and Related Case.

Filed Apr. 1, 2009

The request, made pursuant to California Rules of Court, rule 8.548, for this court to decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit is denied without prejudice and may be re-filed after the issue of standing is finalized.

/s/ GEORGE
Chief Justice