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,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America ("San Diego Boy Scouts") (together "Boy Scouts") respectfully submit this reply in support of their petition for a writ of certiorari to review the June 11, 2008 decision of the United States Court of Appeals for the Ninth Circuit (18a–68a).

A. There Is No Precedent for Respondents' Radical Standing Theory

Respondents' attempt to draw comfort from the environmental case of *Friends of the Earth* v. *Laidlaw Environmental Services*, *Inc.*, 528 U.S. 167, 183 (2000), fails because there were concrete injuries in that case. In *Friends of the Earth*, there were actual, multiple discharges of pollutants into the North Tyger River. *Id.* at 178. The river objectively "looked and smelled polluted." *Id.* at 181. The discharges themselves and the "*reasonable* concerns" about those discharges "directly affected" the plaintiffs' "recreational, aesthetic, and economic interests." *Id.* at 183-84 (emphasis added). The pollution thus provided a "concrete" injury. *See DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006). Here, there is nothing but Respondents' claim to feeling offended. Such feelings are not a concrete injury and do not confer standing. *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, *Inc.*, 454 U.S. 464, 485-86 (1982).

The claim that Respondents were denied recreational enjoyment (Resp. Opp. at 19-27) is contrived. Respondents choose not to go to the facilities managed by San Diego Boy Scouts because Respondents would have to interact with people they do not like. Respondents are asserting an alleged injury of their own making.

B. The Ninth Circuit Rejected All Other Bases For Respondents' Standing

Respondents would have this Court believe that the petition should be denied because they may proceed on other bases of standing in the Ninth Circuit. Contrary to Respondents' assertions, the Ninth Circuit clearly held that "We reject the plaintiffs' other theories of standing: the theory that they have standing as taxpayers and the theory that they suffered injury from the Council's policy of preferential access to the leased property." 530 F.3d at 786.

1. Respondents Do Not Have Municipal Taxpayer Standing

The Ninth Circuit twice rejected Respondents' claim that they have municipal taxpayer standing. 471 F.3d at 1046; 530 F.3d 786-87. For municipal taxpayer standing, Respondents must identify "specific amounts of [tax] money that the government ha[s] spent solely on the unlawful activity." *Doe* v. *Madison School District No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) (en banc); *see Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952).

The Ninth Circuit concluded that no basis for municipal taxpayer standing existed here. First, it is was undisputed that the City spends nothing on the leases to San Diego Boy Scouts. (SER 3 ¶ 9, 5 ¶ 17.) Second, it was undisputed that the leased properties, as dedicated parkland that cannot be sold or commercially developed, have no meaningful market value. (SER 4 ¶ 12, 8 ¶ 24; 200 ¶ I(1), 203 ¶ IV(4); 257-58 (17:24-18:2), 261-62 (33:19-34:4), 263 (105:11-17), 269 (162:6-164:3), 300 (176:9-25); Am. Compl. ¶ 98 (ER 604) (leased properties are "permanently dedicated" parkland).) Third, even if a court could assume away the use restrictions on the properties, Boy Scouts put more into the leased properties than Respondents' experts testified they were worth to buy outright for Boy Scouts' exclusive use. (Youth Aquatic Center: $2.5 million invested (ER 3213) versus $1.25 million market value (ER 1976, 3712); Camp Balboa: $2.4 million invested and to be invested (ER 732, 820, 836) versus $1.25 to $1.9 million market value (ER 1975).) Fourth, if the leases were cancelled, the City would simply lease to another nonprofit on the same lease terms. (SER 4 ¶ 12, 8 ¶ 24.) Indeed, Respondents conceded that they would be content with another nonprofit lessee — one more palatable to them — even if the same rent and lease terms applied. (SER 241 (75:7-24); 234 (55:17-21); 252 (36:14-20); 247-49 (98:5-106:22).) Thus, it was clear that Respondents were not attempting to redress any drain on the City's tax revenue or injury to their pocketbooks but instead were simply attempting to throw Boy Scouts off the property to assuage their personal views.

Based on this record, the Ninth Circuit concluded, "Without a definite expenditure of municipal funds, plaintiffs do not have standing as municipal taxpayers." 530 F.3d at 787.

2. Respondents Were Not Denied Preferential Access

The Ninth Circuit also rejected as a matter of law Respondents' claim to standing based on denial of preferential access to the campground and aquatic center. 530 F.3d 787. Despite extensive evidence of use of the properties by the public, Respondents complained that their potential use of the properties was unequal because the properties are not available for public use when Scouting groups are using the properties. This argument is frivolous.

The facilities are available on a first-come, first-served basis. (SER 216-17, ¶¶ 11, 18.) All users pay the same user fees. (*Id.*) Respondents are treated exactly the same as every other resident of San Diego. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992); *United States* v. *Richardson*, 418 U.S. 166, 176-77 (1974). Of course, if a non-Scout group reserved a campsite for a particular time, Scouts could not use the campsite during that time and vice versa, but the undisputed record shows that Camp Balboa and the Aquatic Center are *never* closed to non-Scout users. (SER 622 (140:12-15), 291 (170:5-12), 624-25 (157:21-158:10).) Even during weeks that Scout camps are being conducted, numerous other groups camp in the campsites and use the pool and other facilities. (SER 624 (156:16-157:16).) San Diego Boy Scouts has not turned away any non-Scout group during that time. (SER 291 (170:13-15, 171:3-6).)

But there is an even more fundamental flaw in Respondents' standing claim: Respondents do not wish to reserve the properties with San Diego Boy Scouts as lessee, so they could not possibly be subject to any unfavorable treatment in scheduling use of the facilities. As the Ninth Circuit concluded,

> The plaintiffs have insisted that they would not use the facilities while the Boy Scouts are lessees. The plaintiffs never contacted the Boy Scouts about using the facilities, and they admitted they knew little or nothing about the Boy Scouts' policies regarding access to the facilities. Without any plans to apply for access, the plaintiffs cannot show actual and imminent injury from a discriminatory policy of denying access.

530 F.3d at 787.

C. This Court Has Jurisdiction Now

This petition presents to this Court the final decision of the court of appeals on standing. There is no question that this Court may hear this case before a judgment in the court of appeals on the merits. 28 U.S.C. § 1254(1); *see United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *see also Ohio Citizens for Responsible Energy*, *Inc.* v. *Nuclear Regulatory Commission*, 479 U.S. 1312, 1313 (1986). And there is every reason that it should do so. *Salazar* v. *Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08-472), presents a closely related standing question, and it makes eminent sense for this case to be considered in conjunction with *Salazar* v. *Buono*.

Indeed, the Ninth Circuit has stayed its consideration of this case pending the resolution of this petition and this Court's decision on the merits in *Salazar* v. *Buono*. (Resp. App. A.)

Finally, Boy Scouts have endured almost ten years of litigation against claims by Plaintiffs who have no standing whatsoever. Boy Scouts' First Amendment rights cannot withstand the onslaught of frivolous litigation indefinitely. *See Van Orden* v. *Perry*, 545 U.S. 677, 683, 699 (2005); *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 845-46 (1995).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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