No. 05-3451

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, GARY GERSON, TIMUEL BLACK, MARY CAY MARUBIO, and C. DOUGLAS FERGUSON,	)	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees,	)	No. 99-2424
v.	)	The Honorable Blanche M. Manning,
DONALD H. RUMSFELD,	)	Judge presiding.
Defendant-Appellant.	)	

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Dated: January 26, 2006

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 05-3451
Short Caption: Eugene Winkler, et al. v. Donald H. Rumsfeld

(1) The full name of every party that the attorney represents:
Timuel Black, C. Douglas Ferguson, Gary Gerson, Mary Cay Marubio, and Eugene Winkler

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:
Roger Baldwin Foundation of ACLU, Inc.; Schiff Hardin LLP

(3) If the party or amicus is a corporation:
i) Identify all its parent corporations, if any: N/A
ii) List any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

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STATEMENT OF JURISDICTION

The jurisdictional statement of Defendant-Appellant Donald H. Rumsfeld ("Defendant") is complete and correct.

ISSUES PRESENTED

1. Whether Plaintiffs have standing as federal taxpayers to bring an Establishment Clause challenge to 10 U.S.C. § 2554 (the "Jamboree Statute"), under which Defendant spends approximately $2 million per year in taxpayer funds to assist the Boy Scouts of America ("BSA") in staging its Jamboree youth gathering.

2. Whether this special treatment of the BSA by the federal government violates the Establishment Clause, given the BSA's exclusion of youth who decline to profess a "duty to God," and its other religious practices.

STATEMENT OF THE CASE

Before a boy may tie his first knot or pitch his first tent as a member of the BSA, he must swear an oath of personal "duty to God." If he declines to sign the oath, the BSA will not admit him, and if he declines to publicly profess the oath at weekly meetings, the BSA will dismiss him. This religious oath is the gateway to all of the BSA's secular activities, including those at the Jamboree. Similarly, the BSA will not tolerate adult leaders who decline to profess that God is "the leading power in the universe" and that non-believers cannot become "the best kind of citizens." The BSA engages in a host of other religious practices, including religious requirements to advance in rank. Moreover, organized religions effectively control the BSA and use it as "a tool of religious ministry."

Despite the BSA's exclusion of nonbelievers and its other religious practices, Congress has authorized Defendant to provide unique and valuable support to the BSA, *and only the BSA*. Specifically, the Jamboree Statute broadly authorizes Defendant to provide "personnel services and logistical support" to the BSA Jamboree. Using this authority, Defendant has spent on average $7 million to support each of the last three Jamborees, and has spent more than $29 million in the last two decades. No other federal statute authorizes Defendant to provide comparable support to comparable private groups. Nonbelievers excluded from the BSA cannot enjoy the benefits of this special spending.

Plaintiffs are federal taxpayers, and include a minister, a rabbi, and an Eagle Scout. They allege that the Jamboree Statute's special treatment of the religious BSA violates the Establishment Clause's requirement that government support for private organizations be neutral between religious and secular groups. On cross-motions for summary judgment, the district court agreed, and entered corresponding declaratory and injunctive relief. DA26, 37-40, 53, 60.[1]

[1] In this brief, "DB" refers to Defendants' appellate brief, "DA" refers to Defendant's appendix, "DSA" refers to Defendant's separate appendix, and "D" refers to the district court's docket numbers. Plaintiffs cite certain summary judgment fact statements as follows: "PF" refers to Plaintiffs' statement of facts (D180), "PAF" refers to Plaintiffs' statement of additional facts (D182), and "DRPF" refers to Defendant's response to Plaintiffs' statement of facts (D173). Finally, Plaintiffs cite the seven *amici curiae* briefs filed in support of Defendant as follows: "ACLJ brief" (from the American Center for Law and Justice, and one U.S. Senator and 87 U.S. Congressmen); "ACRU brief" (from the American Civil Rights Union); "AL brief" (from the American Legion); "BSA brief"; "FFML brief" (from the Foundation for Moral Law); "PLF brief" (from the Pacific Legal Foundation); and "Virginia Brief" (from the Commonwealth of Virginia, and one U.S. Senator and five U.S. Congressmen).

STATEMENT OF FACTS

I. The parties.

Plaintiffs are federal taxpayers who reside in greater Chicago. DRPF at ¶¶ 2-3, 5-6, 8-9, 11-12. They include a Methodist minister, a Reform Jewish rabbi, and an Eagle Scout. *Id.* at ¶ 1, 4, 10.

Defendant is the Secretary of the U.S. Department of Defense ("DOD"). DRPF at ¶ 13. He is sued in his official capacity for declaratory and injunctive relief. DSA28.

II. The BSA.

A. The BSA's exclusion of nonbelievers.

The BSA has three membership programs: Cub Scouting for younger boys; Boy Scouting for older boys; and Venturing for young men and women. DRPF at ¶¶ 20-23. The BSA excludes atheists and agnostics from youth membership and adult leadership in all three of these programs. *Id.* at ¶¶ 44, 47-49. The BSA describes this policy as "unquestionably religious." PF at ¶ 57.

B. The BSA's compulsory religious oaths.

Every Cub Scout, Boy Scout, and Venturer must profess a BSA oath of "duty to God." DRPF at ¶¶ 28-38, 41. For example, the Boy Scout Oath begins: "On my honor I will do my best to do my duty to God . . . ." *Id.* at ¶ 32. Boy Scouts must also subscribe to the Scout Law, including a promise to be "reverent." *Id.* at ¶¶ 33, 35. Similarly, adult BSA leaders must subscribe to the BSA's Declaration of Religious

Principle, which states in part: "The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship." *Id.* at ¶¶ 39-40.

The BSA website explains that "duty to God" is "the bedrock of Scouting's values." DRPF at ¶ 54(a). The BSA also describes "duty to God" as the "heart of the Scouting movement," and "the most important of all Scouting values." PF at ¶ 54(b) & (d). Defendant acknowledges that the BSA is "theistic." DRPF at ¶ 52(c).

Youth seeking to become Boy Scouts or Venturers must agree in writing to live by the appropriate oath, including "duty to God." DRPF at ¶ 42. Thereafter, BSA youth must recite this religious oath publicly and in unison at "virtually all" meetings. *Id.* at ¶ 73(d).

The purpose of all BSA activities is to teach the values of the BSA oaths, including "duty to God." DRPF at ¶¶ 61-64. Indeed, the BSA explains that its recreational activities are "not an end," but only "a vehicle" to learning the values of the BSA oaths, which are "the essence" of Scouting. *Id.* at ¶ 62.

C. The BSA's religious self-descriptions.

A BSA resolution states that the BSA has "faith-based values"; a BSA annual report states that the BSA has a "faith-based mission"; and a BSA speech states that the BSA has "strong religious tenets." PF at ¶ 53(a) - (c). In one lawsuit, the BSA described itself as a "religious

organization," and stated that its outdoor program "reinforces the religious nature of the Scouting program." *Id.* at ¶¶ 52(a), 60. In another lawsuit, the BSA described itself as a "religious association" with a "religious mission." *Id.* at ¶¶ 52(b), 53(d).

D. The BSA's strong ties to organized religions.

The BSA grants charters to various groups to maintain individual Cub Scout Packs, Boy Scout Troops, and Venturer Crews. DRPF at ¶¶ 24-25. Religious organizations hold 63% of these charters. *Id.* at ¶ 66. Chartered organizations appoint delegates to the BSA Local Councils; the Local Councils appoint delegates to the BSA National Council; and the National Council elects the BSA National Executive Board, which is the final BSA reviewing authority. *Id.* at ¶ 27. The BSA explains that by this mechanism, organized religions have a "direct influence" on the BSA National Executive Board. PF at ¶ 68.

Organized religions have embraced the BSA because it requires "duty to God." DRPF at ¶ 67. Moreover, in an *amici curiae* brief filed with the U.S. Supreme Court, organized religions that charter more than one million Scouting youth explained that they use Scouting "as a tool of religious ministry," and that these churches are "deeply (and productively) intertwined" with the BSA. PAF at ¶ 1. The BSA acknowledges that it is "closely tied" to organized religions. PF at ¶ 65.

The BSA prints religious materials developed and promulgated by organized religions for use with Scouting youth. DRPF at ¶¶ 90, 106.

For example, to assist in the celebration of "Scout Sunday" – an annual religious event promoted by the BSA (*id.* at ¶ 89) – the BSA printed a booklet titled "A Scout is Reverent: Scout Sunday Observance." *Id.* at ¶ 90. This booklet contains Protestant prayers, and a church bulletin titled "Bringing Youth to Christ Through a Scouting Ministry." *Id.*

E. Other religious aspects of the BSA.

First, the BSA requires religious activity to advance in rank. For example, to become a First Class Boy Scout, a boy must lead his patrol in saying grace. PF at ¶ 94. Similarly, to become a Bear or Webelos Cub Scout, a boy must earn the religious emblem of his faith or undertake other religious duties. *Id.* at ¶¶ 92-93.

Second, the BSA promotes religious rituals at BSA events. For example, on BSA camping trips, the BSA encourages and Troops often perform worship services. PF at ¶ 76. Similarly, at BSA summer camp, the "general spirit" is that "the spiritual life of the campers is strengthened." DRPF at ¶¶ 78-79.

Third, the BSA promulgates and distributes religious materials to youth members. PF at ¶¶ 105-08. For example, the Boy Scouts Songbook contains numerous religious hymns such as "All Hail the Power of Jesus' Name." DRPF at ¶ 105. Similarly, the BSA's monthly magazine regularly includes Bible stories. PF at ¶ 107.

Fourth, the BSA encourages its youth members to earn the religious emblem of their faith to wear on their uniform. DRPF at ¶¶ 95,

98-99. Every year, more than 75,000 boys do so. *Id.* at ¶ 96. The BSA describes this as a "key" component of Scouting. *Id.* at ¶ 97.

Fifth, all Scouting units may have an adult religious leader serve as a chaplain, and a youth member serve as a chaplain aide. PF at ¶¶ 100-01, 103. This is "customary" when the unit is chartered by organized religions. *Id.* at ¶ 100. The chaplain and chaplain aide provide unit worship services and ensure a religious emphasis in all unit activities. *Id.* at ¶ 102, 104.

III. DOD support for the BSA Jamboree.

Every four years, tens of thousands of BSA youth gather at the BSA Jamboree. DRPF at ¶ 80. Fort A.P. Hill, a DOD facility in Virginia, has hosted the event from 1981 to the present. *Id.* at ¶ 110.

A. The Jamboree Statute.

As originally enacted in 1972, the Jamboree Statute authorizes Defendant, "without reimbursement," to "furnish services" in support of the BSA Jamboree. 10 U.S.C. § 2554(a). It also authorizes non-military federal departments to support the Jamboree. *Id.* at § 2554(h). The accompanying Senate Report explained that the authorized "services" would "typically" include "communications, medical, engineering, protective, and logistic," as well as "administrative," "accounting," "organizational maintenance," and "bandsmen." S. Rep. No. 92-631 (Feb. 17, 1972), *as reprinted in* 1972 U.S.C.C.A.N. 2022-23.

As amended in 1996, the Jamboree Statute further authorizes Defendant to "provide personnel services and logistical support" for Jamborees held on military bases. 10 U.S.C. § 2554(g).

As amended in 2005, the Jamboree Statute prohibits Defendant from providing a lower "level of support" for a Jamboree than was provided for the preceding Jamboree, unless Defendant reports to Congress a finding that maintaining that level of support would harm national security. 10 U.S.C. § 2554(i) .

B. DOD spending pursuant to the Jamboree Statute.

Under the Jamboree Statute, Defendant has spent more than $29 million to support the Jamboree during the last two decades, including on average $7 million for each of the last three Jamborees. DRPF at ¶¶ 112-13.

Most of this spending does not involve military personnel. First, the DOD spends millions of dollars per Jamboree to hire temporary civilian labor. DRPF at ¶ 115. For example, the DOD at one Jamboree spent approximately $500,000 to hire temporary civilian workers to erect and take down tents. *Id.* at ¶ 116(b). Second, the DOD spends additional millions of dollars per Jamboree to pay for civilian goods. *Id.* at ¶¶ 117-119.

When Jamboree Statute spending utilizes military personnel, it typically involves irregular tasks that provide little or no military training. For example, the DOD at one Jamboree spent $211,000 for the "Army

Adventure Area," including $65,000 for mementos and $6,500 for cookie dough. DRPF at ¶¶ 120-22. Moreover, the commander of a combat engineering unit deployed to a Jamboree complained in an official report: "This project is a tasking, not a training event. . . . [T]his mission offers little, if any, added value to the readiness of a Corps combat engineer company." Id. at ¶¶ 131-32.

C. Religious activity at the BSA Jamboree.

First and foremost, the BSA excludes nonbelievers from participation as Scouts in the Jamboree. DRPF at ¶¶ 44, 81. This contradicts the BSA's leases from the DOD to use Fort A.P. Hill. *Id.* at ¶¶ 141-44.

Second, the BSA issued a Jamboree "Troop Leader Guide" stating that a prayer book is "required personal camping equipment" for youth attendees; encouraging every Troop to appoint a chaplain aide; and encouraging all participants to say grace at meals. DRPF at ¶ 82. Third, the BSA promulgated a "Duty to God" booklet containing recommended prayers for each day of the Jamboree, and instructing youth to "acknowledge God's presence." *Id.* at ¶ 83. Fourth, the BSA created a "Duty to God" patch for all Scouts who attended a religious service and satisfied several other religious obligations, to wear on the Scout uniform next to the commemorative Jamboree patch. *Id.* at ¶ 84.

IV. The District Court's decision below.

On March 16, 2005, the district court granted summary judgment for Plaintiffs as to their Establishment Clause challenge to the Jamboree Statute. DA53. The court held that Plaintiffs have federal taxpayer standing, because Congress enacted the Jamboree Statute under the Taxing and Spending Clause of the U.S. Constitution, even if the Statute also implicated another congressional power. DA11-18. The court reasoned that the Jamboree Statute authorizes non-military federal agencies to assist with the Jamboree, that the Statute and its legislative history are silent as to any military purpose, and that the Taxing and Spending Clause authorizes taxing and spending "for the common defence." DA17-18.

The district court next held that the BSA is religious for purposes of Establishment Clause analysis of non-neutral government aid to the BSA. DA29-36. The court emphasized the BSA's exclusion of nonbelivers, mandatory religious oaths, and myriad other religious policies and practices. DA31-34.

Finally, the district court held that the Jamboree Statute's preferential treatment for the religious BSA violates the Establishment Clause's neutrality principle. DA26, 37-40. The court further held that such non-neutrality endorses religion. DA39-40.

On June 22, 2005, the district court entered a corresponding declaratory judgment, and enjoined Defendant from providing any aid to

the BSA pursuant to the Jamboree Statute. DA60. By Plaintiffs' motion, this injunction exempted the then-imminent 2005 Jamboree. DA60.[2]

[2] The other aspects of Plaintiffs' complaint (DSA1-30) are not part of this appeal. Under settlement agreements, Defendant and the Chicago Public Schools ended their respective direct sponsorship of BSA units. *See* D193 at ¶ 4(a) & Exh. 1. Plaintiffs do not appeal summary judgment rulings against them regarding: (a) the Overseas Scouting Statute, 10 U.S.C. § 2606 (DA18-20, 53); (b) two Innovative Readiness Training statutes, 10 U.S.C. § 2012 and 32 U.S.C. § 508 (DA55-58); and (c) two HUD block grant statutes, 42 U.S.C. §§ 5303 & 11902 (DA22-25, 41-53).

SUMMARY OF ARGUMENT

Plaintiffs have standing as federal taxpayers to challenge the Jamboree Statute. Congress taxed and spent the challenged funds pursuant to the Taxing and Spending Clause, and thereby violated the Establishment Clause. *See Flast v. Cohen*, 392 U.S. 83 (1968). This and other courts have found federal taxpayer standing in similar cases, including challenges to military spending, even if Congress acted under a constitutional grant of power in addition to the Taxing and Spending Clause. *See, e.g., Freedom From Religion Found. v. Chao ("Chao")*, – F.3d – , 2006 WL 73404, *3 (7th Cir. Jan. 13, 2006); *Katcoff v. Marsh*, 755 F.2d 223, 231 (2d Cir. 1985). In the alternative, the millions of dollars in spending challenged here – including $500,000 to pay temporary civilian workers to put up tents, and $6,500 to purchase cookie dough – comprise spending on recreational services for a private group under the Taxing and Spending Clause, and not armed services spending under the Military Clauses. *See infra* Part I.

The BSA is religious for purposes of Establishment Clause scrutiny of special government aid to the BSA. Most significantly, the BSA excludes nonbelievers and mandates a religious oath. *See infra* Part II.

The Jamboree Statute violates the Establishment Clause. Congress and Defendant have singled out the BSA for a unique and substantial federal benefit: approximately $7 million per Jamboree in personnel services and logistical support. Comparable organizations

cannot obtain comparable aid under the Jamboree Statute, or any other federal statute or program. The federal government's special treatment of the religious BSA violates the Establishment Clause's neutrality requirement. *See infra* Part III.[3]

[3] The Establishment Clause issue on appeal is far narrower than suggested by Defendant's *amici*. First, the issue concerns *special* government support for the BSA, which will not effect *equal* BSA access to generally available government benefits and public forums. *Cf.* AL brief at 2; FFML brief at 3; PLF brief at 20. For example, Plaintiffs do not contest equal BSA access to DOD security services, or to DOD recreational properties like Fort A.P. Hill. *See* DB at 8, 10, 22, 48; BSA brief at 2-5. Second, the issue concerns *government* spending, which will not effect the BSA's ability to seek substitute *private* spending. *Cf.* BSA brief at 1; PLF brief at 4; Virginia brief at 1, 11. A change from public to private funding would not effect the attending youth or the local economies. *See* BSA brief at 2, 25-29; Virginia brief at 2, 5-11.

STANDARD OF REVIEW

Summary judgment is reviewed *de novo*. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999) .

ARGUMENT

I. Plaintiffs have standing.

Under *Flast* and its progeny, including this Court's recent *Chao* decision, federal taxpayers have standing to challenge congressional taxing and spending – including DOD spending – that itself comprises a violation of the Establishment Clause. This is true even if the challenged spending does not involve a cash grant program, and even if it arguably implicates a constitutional source of congressional power in addition to the Taxing and Spending Clause, such as the Military Clauses.[4] *See infra* Part I(A).

Here, Plaintiffs have federal taxpayer standing, because the essence of their complaint is that Congress has appropriated taxpayer funds for the BSA Jamboree in violation of the neutrality principle of the Establishment Clause. Spending is the challenged conduct, and not just a means to accomplish the challenged conduct. Moreover, the challenged spending is substantial in size: some $7 million per Jamboree, and a total of $29 million in the last two decades. As amended, the Jamboree Statute prohibits the DOD from spending less

[4] The Taxing and Spending Clause empowers Congress "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. The Military Clauses empower Congress to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." *Id.* cls. 12-14.

on future Jamborees. Even if this Court concludes that it legally relevant whether the challenged spending implicates the Military Clauses – a conclusion Plaintiffs dispute – Plaintiffs still have standing, because the function of this spending is to provide civilian recreational services, and only minimally (if at all) to provide any military benefit. *See infra* Part I(B).

Defendant's unpersuasive legal authority does not undercut Plaintiffs' standing. *See infra* Part I(C). Nor does Congress's recent attempt to short-circuit the decision below through so-called "findings" about DOD spending on the Jamboree. *See infra* Part I(D). Finally, Plaintiffs' injuries are redressable. *See infra* Part I(E).

A. The law of federal taxpayer standing.

1. *Flast v. Cohen.*

In *Flast*, the Supreme Court held that federal taxpayers have standing to challenge federal spending where two conditions exist. First, Congress must have taxed and spent the challenged funds pursuant to the Taxing and Spending Clause. 392 U.S. at 102. The challenged spending cannot be merely "incidental" to an "essentially regulatory statute." *Id.* Second, the challenged spending must violate a constitutional limit on Congress's spending power, such as the Establishment Clause. *Id.* at 102-03.

The Court reasoned that "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was

that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. The Court easily distinguished *Frothingham v. Mellon*, 262 U.S. 447 (1923) (finding no taxpayer standing), because the plaintiff there did not allege the violation of a constitutional limit on congressional spending. 392 U.S. at 105. The Court further explained that when federal taxpayers challenge spending that violates the Establishment Clause, "we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness, and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.* at 106.

Congress arguably could have enacted the nationwide educational grant program challenged in *Flast*, 392 U.S. at 85-86, not solely on the basis of the Taxing and Spending Clause, but also on the basis of the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Education spending has a significant impact on aggregate employment and the nationwide economy, and the Commerce Clause is a broad power. *See, e.g., Gonzalez v. Raich*, 125 S. Ct. 2195 (2005). Thus, *Flast* shows that federal taxpayer standing is not foreclosed where Congress acts under the Taxing and Spending Clause and also another constitutional source of congressional power.

2. *Freedom From Religion Foundation v. Chao.*

In *Chao*, this Court recently held that federal taxpayers have standing to challenge federal spending to pay for conferences to promote President Bush's faith-based initiative, even though the plaintiffs did *not* challenge cash grants issued under that initiative. 2006 WL 73404, *4, *6, *8. The Court expressly rejected the argument that taxpayer standing is limited to challenges to cash grant programs, reasoning that "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause . . . without making outright grants to religious organizations." *Id.* at *6.

Chao provides a realistic construct for applying *Flast*'s holding that there is no taxpayer standing to challenge "incidental" spending. *See* 392 U.S. at 102. Because the amount of spending on any particular program is small compared to the federal government's $2 trillion annual budget, the fact that the challenged spending is "slight relative to" the defendant department's budget does not render such spending "incidental." *Chao*, 2006 WL 73404, *6. Rather, spending is "incidental" within the meaning of *Flast* only where it does not itself cause the alleged Establishment Clause violation (*e.g.*, the expense of security during a speech where the President endorses religion), or when the spending is nominal (*e.g.*, the expense of processing the Catholic Church's application for a tax exemption). *Id.* at **6-7. Conversely, taxpayers have standing to challenge spending that is both significant in size, and

of itself violates the Establishment Clause (*e.g.*, spending by the Department of Homeland Security to build a mosque and pay an imam to pray therein, as a means to reduce the likelihood of Islamic terrorism). *Id.* at *5.

Finally, *Chao* indicates that federal taxpayer standing does not turn on whether the challenged spending implicates a congressional power in addition to the Taxing and Spending Clause. Rather, the focus in *Chao* was on the nature of the challenged spending, and whether it was "incidental" within the meaning of *Flast*. Moreover, the spending to prevent terrorism in the mosque hypothetical – where taxpayers were assumed to have standing – would implicate the Military Clauses at least as much as the disputed Jamboree spending here.

3. Additional legal authority.

Chao is buttressed by four similar decisions. In *Katcoff*, the Second Circuit held, "for reasons fully explained" by the district court, that federal taxpayers had standing to challenge DOD spending on military chaplains. 755 F.2d at 231, *incorporating* 582 F. Supp. 463, 467-71 (E.D.N.Y. 1984). *See also Jewish War Veterans v. United States*, 695 F. Supp. 3, 10-11 (D.D.C. 1988) (finding federal taxpayer standing to challenge the DOD's expenditure of $13,000 to rebuild a Latin cross on military property).

In *Katcoff*, the district court expressly rejected the argument that there is no taxpayer standing when the challenged DOD spending

arguably implicates both the Military Clauses and the Taxing and Spending Clause. 582 F. Supp. at 471. The court reasoned as follows. First, the chaplain program involved substantial congressional spending, *id.*, and Congress thus "clearly exercised its Constitutional authority to spend," even if it arguably also exercised "additional powers." *Id.* at 470. Second, "there is no litmus test to determine which power Congress exercises in enacting a given statute," and thus "a federal court should not attempt to divine" whether spending is under one constitutional clause or another. *Id.* at 470-71. Third, the Supreme Court's "central concern" in *Flast* was "the *fact* of Congressional spending – rather than the nominal source of that spending." *Id.* (emphasis in original). Fourth, the Taxing and Spending Clause on its face authorizes taxing and spending for "the common defence," *id.*, as well as for the "general welfare."

The *Katcoff* court properly relied on this "common defence" language of the Taxing and Spending Clause. Statutory words should be given their plain meaning and should not be rendered superfluous. *See Varity Corp v. Howe*, 516 U.S. 489, 522 (1996); *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000). Moreover, *Flast* twice identified the entire "taxing and spending clause" when it defined the scope of taxpayer standing. 392 U.S. at 102, 106.

Similarly, in *Newdow v. Eagen*, 309 F. Supp. 2d 29, 39 (D.D.C. 2004), a district court held that a federal taxpayer had standing to

challenge Congress's payment of salaries to legislative chaplains. The court explicitly rejected the argument that there is no federal taxpayer standing where Congress arguably acted under both the Taxing and Spending Clause and another clause. *Id.* at 38-39. Following *Katcoff*, the court reasoned that the spending "was at least in part" authorized by the Taxing and Spending Clause. *Id.* at 39. *See also Kurtz v. Kennickell*, 622 F. Supp. 1414, 1416 (D.D.C. 1985) (finding federal taxpayer standing to challenge almost $20,000 per year spent to publish the prayers offered by congressional chaplains).

4. Summary of the law of federal taxpayer standing.

Under *Flast* and its progeny, including *Chao*, federal taxpayers have standing to challenge non-nominal federal taxing and spending that itself violates the Establishment Clause. Such standing extends to DOD spending, as in *Katcoff* and *Jewish War Veterans*. Such standing is not limited to cash grants: *Chao* squarely ruled thusly, and all five of the foregoing appellate and district court decisions allowed challenges to spending that does not involve grants. *Cf.* DB at 21, 25, 35-38. Nor is such standing limited to spending that implicates solely the Taxing and Spending Clause and not also another clause: this is explicit in *Katcoff* and *Newdow,* and strongly supported by *Flast* and *Chao*. *Cf.* DB at 21, 24-25, 28-37.

Chao and these other decisions do not create (in Defendant's words) a "roving" power for federal taxpayers to challenge "any and all

federal action." *Cf.* DB at 31. First, federal taxpayer standing does not apply where there is no spending, "incidental" spending, or any spending of non-appropriated funds not collected from taxpayers. For example, *Flast* standing does not extend to DOD leases and loans, or to non-appropriated DOD funds spent for recreation on military bases. *See* D176 at 5 n.3. Second, *Flast* standing is restricted to violations of constitutional limits on congressional spending, like the Establishment Clause. *See, e.g., Tarsney v. O'Keefe*, 225 F.3d 929, 936 (8th Cir. 2000) (holding that taxpayer standing does not extend to enforcement of the Free Exercise Clause, because it is not a spending limit); *Pietsch v. President*, 434 F.2d 861, 863 (2d Cir. 1970) (holding that taxpayer standing does not extend to enforcement of Congress's power to declare war, because it is not a spending limit). Thus, in the twenty years since *Katcoff* and *Kurtz*, there has been no deluge of federal taxpayer litigation.

B. The challenged spending.

Plaintiffs have standing to challenge the disputed DOD spending under the Jamboree Statute. First, Congress taxed and spent the challenged funds pursuant to its power under the Taxing and Spending Clause. *See infra* Part I(B)(1). Second, the challenged spending is substantial in size. *See infra* Part I(B)(2). Third, the challenged spending itself comprises – and is not merely "incidental" to – Defendant's violation of the Establishment Clause. *See infra* Part I(B)(3). Under the legal

authority above, this is enough to establish plaintiffs' federal taxpayer standing.

For the reasons set forth above, federal taxpayer standing under *Flast* and its progeny is not lost solely because the challenged spending rests on both the Taxing and Spending Clause and another constitutional grant of congressional power. However, even if this Court were to reach the opposite legal conclusion, Plaintiffs would still have standing, because the vast majority of the challenged Jamboree Statute spending provides civilian recreational services that implicate the Taxing and Spending Clause, and does not provide training, recruiting, or other military benefits that might implicate the Military Clauses. *See infra* Part I(B)(4).

1. Congress utilized the Taxing and Spending Clause.

Two congressional taxing and spending actions are the *sine qua non* of the challenged DOD spending in support of the BSA Jamboree. First, Congress enacted and twice expanded the Jamboree Statute, which authorizes this spending. Second, Congress annually appropriates the taxpayer funds that the DOD spends pursuant to the Jamboree Statute. *See Chao*, 2006 WL 73404, *5 (holding that taxpayer standing extends to challenges to congressional appropriations to executive agencies, even if the appropriations are not earmarked for particular purposes).

2. The size of the challenged spending is substantial.

The DOD on average spent $7 million on each of the last three Jamborees. DRPF at ¶¶ 112-14. The Jamboree Statute prohibits the DOD from spending less on future Jamborees. 10 U.S.C. § 2554(i). In the last two decades, the DOD's Jamboree spending has exceeded $29 million. DRPF at ¶¶ 112-14. The aforementioned DOD spending does not include the salaries paid to the military personnel deployed to the Jamboree. PF at ¶ 138(a). *Cf.* DB at 36.

The size of this substantial spending is not "incidental," as that term is used in *Flast*, 392 U.S. at 102-03. *See Katcoff*, 582 F. Supp. at 470 (holding that the size of the DOD's spending on the military chaplain program established that the spending was not "incidental"); *Chao*, 2006 WL 73404, **6-7 (stating that the nominal amount of spending required to process a tax exemption application is "incidental"). *See also Flast*, 392 U.S. at 103 (emphasizing the size of the federal spending as a basis to find taxpayer standing); *Kurtz*, 622 F. Supp. at 1416 (same). *Cf.* DB at 21, 31, 36.[5]

[5] Moreover, the Jamboree Statute is not "essentially regulatory" as that term is used in *Flast*. It regulates neither the private sector, nor the manner in which the DOD provides "personnel services and logistical support" to the Jamboree. *See* 10 U.S.C. § 2554(g). Also, the DOD is not a "regulatory agency" under federal regulatory laws. PF at ¶ 16.

3. The challenged spending comprises the Establishment Clause violation.

The gravamen of Plaintiffs' lawsuit is that Congress and Defendant have violated the neutrality principle of the Establishment Clause by singling out the religious BSA for special spending of millions of taxpayer dollars per year. Thus, the challenged spending is the very essence of Plaintiffs' injury.

Accordingly, this case is like the hypothetical mosque in *Chao*, in which taxpayers have standing to challenge spending that of itself violates the Establishment Clause (*i.e.*, spending to build a mosque and hire an imam to pray therein). 2006 WL 73404, **5-6. Conversely, this case is unlike the hypothetical Presidential security in *Chao*, in which taxpayers lack standing to challenge spending that is merely incidental to the alleged Establishment Clause violation (*i.e.*, spending to provide security at a Presidential speech that allegedly endorses religion). *Id.* at **6-7. Thus, the challenged spending is not "incidental" under *Flast*, 392 U.S. at 102.

4. The challenged spending does not implicate the Military Clauses.

As a matter of law, the fact that spending implicates the Military Clauses in addition to the Taxing and Spending Clause does not by itself deprive federal taxpayers of standing. *See Katcoff*, 582 F. Supp. at 471; *Newdow*, 309 F. Supp. 2d at 38-39. *See also Chao*, 2006 WL 73404, **5-7. But even if it did, plaintiffs would still have standing, because the

challenged spending here in fact does not implicate the Military Clauses. Rather, the primary function of the DOD's Jamboree spending is to help a civilian organization provide non-DOD youth with an outdoor summer adventure. The vast majority of this recreational spending does not advance training, recruitment, or other military objectives. *Cf.* DB at 2, 12-16; BSA brief at 2, 28-32, 34; ACLJ brief at 1-2, 11; ACRU brief at 4-6; PLF brief at 3, 8-10. Indeed, Defendant conceded below that the DOD's Jamboree spending "does not implicate core military functions such as war-fighting." D176 at 12.

Most significantly, the vast majority of the DOD's Jamboree spending is used to hire temporary civilian labor, and to pay for civilian goods. DRPF at ¶¶ 115-19. *Cf.* DB at 33, 36. At the 2005 Jamboree, the DOD paid $2.9 million for civilian labor and $3.6 million for civilian goods – or 40% and 49%, respectively, of the total $7.3 million spent by the DOD. DRPF at ¶¶ 113, 115(a), 117(a). For example, the DOD has spent $500,000 to hire civilian labor to put up tents. *Id.* at ¶ 116. *See also id.* (discussing spending for civilian labor for road, water, sewer, electrical, and telephone work). Also, the DOD has paid $160,000 for commercial vehicles, and $13,000 for pediatric medical supplies. *Id.* at ¶¶ 117-19. Spending to hire temporary civilian labor and pay for civilian goods does not improve the training of military personnel. Nor does it promote any discernable recruitment or other military message.

Moreover, the DOD spends hundreds of thousands of taxpayer dollars per Jamboree to assign military personnel to tasks that provide little or no military training. For example, the "Army Adventure Area" at one Jamboree cost $211,000, including $65,000 for mementos and $6,500 for cookie dough. DRPF at ¶¶ 120-21. Similarly, the DOD spends hundreds of thousands of dollars to deploy military personnel to the Merit Badge Midway (*id.* at ¶¶ 124-26), and to provide dozens of military performing units (*id.* at 127-29). As to the logistical services performed by military personnel at the Jamboree, the commander of one combat engineering unit complained that "this mission offers little, if any, added value to the readiness of a Corps combat engineer company." *Id.* at 131-32.

The fact that the DOD's Jamboree spending provides little or no military benefit follows directly from the plain language of the Jamboree Statute. The Statute broadly authorizes the DOD to provide "personnel services and logistical support" at the Jamboree. 10 U.S.C. § 2554(g). Yet the Statute does not limit this broad authority to spending that actually provides a military benefit. In this respect, the Jamboree Statute is unlike other statutes authorizing DOD aid to civilians. *See, e.g.,* 10 U.S.C. § 2012(a) (allowing certain DOD projects for civilian groups, but only if they are "incidental to military training").

Accordingly, the Jamboree Statute is unmoored from Military Clause considerations.[6]

The Jamboree Statute also authorizes non-military federal agencies to assist the BSA Jamboree. 10 U.S.C. § 2554(h) . Under this authority, the U.S. Department of Health and Human Services provides sanitation services, and at least eight other federal agencies provide educational services. DRPF at ¶¶ 145-47. This shows that the focus of the Jamboree Statute is to assist the BSA, as opposed to the DOD.

In short, the DOD's Jamboree spending is best understood as civilian recreational spending controlled by the Taxing and Spending Clause, and not armed forces spending controlled by the Military Clauses. To the extent that some small portion of the DOD's Jamboree spending provides some military benefit and thus implicates the Military Clauses, Plaintiffs nonetheless have taxpayer standing to challenge that spending. *See Katcoff*, 582 F. Supp. at 471; *Newdow*, 309 F. Supp. 2d at 38-39. *See also Chao*, 2006 WL 73404, **5-7. And even if Plaintiffs lacked standing to challenge the small portion of the DOD's Jamboree spending that provided some military benefit, Plaintiffs would retain standing to challenge the vast majority that does not.

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[6] There is no record evidence of any non-statutory DOD policy mandating that each item of DOD aid to the Jamboree provide a military benefit. *Cf.* DB at 12. While a DOD summary judgment declaration states that DOD aid to the Jamboree "should" have a military benefit, that term is permissive, and the declaration does not name the supposed policy. DSA72 at ¶ 15.

C. Defendant's legal authority is unpersuasive.

Defendant relies in significant part on three inapposite Supreme Court decisions that do not involve challenges to congressional spending. DB at 20, 24, 28-32, 37. In *United States v. Richardson*, 418 U.S. 166 (1974), the plaintiff challenged the nondisclosure of the CIA's budget. The plaintiff did not challenge spending as such, and did not allege the violation of a constitutional spending limit. *Id.* at 174-75.

In *Schlesinger v. Reservists' Committee to Stop the War*, 418 U.S. 208, 228 (1974), the plaintiffs challenged "the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." The plaintiffs alleged that this practice caused "undue influence" by executive officials over legislative officials, *id.* at 212, but failed to allege a violation of a spending limit, *id.* at 209-11, or any spending action, *id.* at 228. While the relief sought by plaintiffs included reclamation of reserve pay, *id.* at 211, "[s]uch relief would follow from the invalidity of Executive action," and "not from the invalidity of the statutes authorizing pay." *Id.* at 228 n.17. *See also Chao*, 2006 WL 73404, *7 (distinguishing *Richardson* and *Schlesinger* as cases where taxpayers sought "to enforce provisions of the Constitution other than the establishment clause"). *Cf.* DB at 37.

In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the plaintiffs challenged the executive branch's conveyance of government property at no charge to a

religious college. The plaintiffs did not challenge congressional taxing and spending, but rather the possible loss of sale revenue. *Id.* at 479-80 & n.17. There is no evidence that the challenged conveyance – including any paperwork processing and property preparation (DB at 37) – involved non-nominal spending. *See Chao*, 2006 WL 73404, *3 (distinguishing *Valley Forge* as a case involving "simply giv[ing] away surplus property," and not "an expenditure of appropriated funds"); *Katcoff*, 755 F.2d at 231 (same); *Kurtz*, 622 F. Supp. at 1416 (same).[7]

Defendant also relies on four poorly reasoned and factually distinct appellate and district court decisions. DB at 28-29. In *Richardson v. Kennedy*, the plaintiffs challenged Congress's delegation of power to set its own salary. 313 F. Supp. 1282, 1286 (W.D. Pa. 1970), *aff'd mem.*, 401 U.S. 901 (1971).[8] There was no challenge to spending as such, and the Establishment Clause was not an issue. Moreover, *Richardson* rests on a flawed interpretation of *United States v. Butler*, 297 U.S. 1, 64-66 (1936), which held that the Taxing and Spending Clause is not limited to subjects contained in the Constitution's other grants of legislative power.

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[7] Defendant argues that under *Valley Forge*, the DOD's leases and loans of property are not subject to federal taxpayer standing. DB at 7-9, 11, 20, 25, 32, 36. However, Plaintiffs do not challenge these loans and leases.

[8] Through summary affirmance, the holding in *Richardson* controls only the precise issue decided, and its reasoning is not controlling. *See Illinois State Bd. of Elections v. Socialist Workers*, 440 U.S. 173, 180-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Inexplicably, *Richardson* found "[i]mplicit" in *Butler*'s expansive interpretation of the Taxing and Spending Clause "a recognition that Congress need not draw authority from this clause if another constitutional provision confers the power to spend for a specific purpose." 313 F. Supp. at 1285.

In *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir. 1986), the plaintiffs challenged the appointment of an ambassador and spending on an embassy, which are "foreign affairs" matters "vested exclusively" in the federal government. *Id.* at 199. Moreover, *Americans United* mistakenly cites *Flast* (and no other authority) for the proposition that taxpayer standing extends only to expenditures "solely dependent upon" the Taxing and Spending Clause. *Id.* at 199.

In *Phelps v. Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987), plaintiff challenged an ambassador appointment, a diplomatic matter that "do[es] not deal with the general welfare," *id.*, and is even "more remote" from taxpayer status than embassy spending. *Americans United,* 786 F.2d at 200. The reasoning in *Phelps* simply piggybacks upon the flawed reasoning in *Americans United*. 812 F.2d at 1294.

Finally, in *Shaffer v. Clinton*, 54 F. Supp. 2d 1014 (D. Colo. 1999), the plaintiffs alleged that automatic cost-of-living adjustments to congressional salaries violated the Constitution's requirement of new elections before a congressional pay raise becomes effective. There was

no Establishment Clause challenge. *Id.* at 1017. Moreover, the court's analysis rested solely on the flawed *Richardson v. Kennedy* decision. *Id.*[9]

D. The Support Our Scouts Act does not diminish Plaintiffs' standing.

The Jamboree Statute's text and history as originally enacted in 1972 and as amended in 1996 are devoid of any explanation of how DOD spending on the Jamboree might benefit the DOD. In 2005, Congress belatedly ended this 33-year silence by adopting a conclusory "finding" that DOD support for the Jamboree promotes military training. *See* Pub. L. 109-148, § 8126. Congress openly acknowledged that this eleventh-hour "finding" was an attempt to undo the district court's decision below. *See* 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (statement of Sen. Frist); *id.* at S8605 (statement of Sen. Inhofe); *id.* at S8607 (statement of Sen. Enzi).

This so-called "finding" does not diminish Plaintiffs' standing. *See id.* (statement of Sen. Levin) (explaining that the Senate Democratic caucus did not object to this bill because it "does not purport to limit the jurisdiction of a Federal court in determining what the Constitution

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[9] Defendant is not assisted by cases denying taxpayer standing to challenge wars, where the plaintiffs did not allege a violation of a constitutional limit on congressional spending. *See Pietsch v. President*, 434 F.2d 861 (2d Cir. 1970); *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y. 1991); *Monsky v. Commr.*, 1977 WL 3420 (U.S. Tax Ct. 1977). Equally inapposite is *Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975), where a municipal taxpayer challenged municipal regulations under the Free Speech Clause. *Cf.* DB at 38.

means"). As a matter of law, even if this so-called "finding" compelled the conclusion that the Jamboree Statute implicates the Military Clauses in addition to the Taxing and Spending Clause, this fact would not deprive plaintiffs of federal taxpayer standing. *See Katcoff*, 582 F. Supp. at 471; *Newdow*, 309 F. Supp. 2d at 38-39. *See also Chao*, 2006 WL 73404, **5-7.

Moreover, as a factual matter, this "finding" does not show that the Jamboree Statute implicates the Military Clauses. The congressional record is devoid of any factual evidence to support the supposed "finding." Indeed, the lead sponsor acknowledged that it simply comprises "the view of Congress." 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (statement of Sen. Frist). Also, this so-called "finding" is flatly contradicted by the undisputed record evidence in this case of the DOD's Jamboree spending of millions of taxpayer dollars to pay for temporary civilian labor and civilian goods, which patently does not promote military training. *See supra* Part I(B)(4).

Furthermore, the title of the bill – the "Support Our Scouts Act," Pub. L. 109-148, § 8126(a) – demonstrates that the purpose of this "finding" was to help the BSA, and not the military. Similarly, the floor debate focused on what this bill would do to help the BSA, as opposed to the military. *See* 151 Cong. Rec. S8605 (daily ed. July 21, 2005) (statement of Sen. Inhofe) ("I hope my colleagues will join me in defending this organization [the BSA] and others like it."); *id.* (statement

of Sen. Allard) ("I rise today in support of the Boy Scouts of America and the support Our Scouts Act of 2005"); *id.* at S8606 (statement of Sen. Enzi) (the Jamboree "provides a unique opportunity for the military and civilian communities to help" BSA youth).

E. The injunction below redresses Plaintiffs' injury.

Defendant argues on appeal that two statutes and a regulation separate from the Jamboree Statute authorize DOD spending on the Jamboree; that Plaintiffs' injuries thus are not redressable by this lawsuit; and that Plaintiffs thus lack standing. DB at 9-10, 21, 25, 38-39. However, Plaintiffs on appeal do not challenge *neutral* DOD programs in which the BSA and an array of other groups have an equal opportunity to compete for DOD assistance. Rather, Plaintiffs challenge the *non-neutral* Jamboree Statute. Thus, the decision below striking down the Jamboree Statute fully remedies Plaintiffs' injuries.

Moreover, Defendant did not raise this redressability argument below, so it is waived. *See, e.g., Cody v. Harris*, 409 F.3d 853, 857 (7th Cir. 2005). Indeed, Defendant refused to answer Plaintiffs' discovery requests regarding statutory authority other than the Jamboree Statute for DOD support for the Jamboree, and successfully resisted Plaintiffs' motion to compel on this point. *See* D136 at 3-4. Defendant cannot now present this redressability argument for review, having impeded below the development of a full and fair evidentiary record on this point for this Court.

Furthermore, the authority cited on appeal by Defendant does not authorize the challenged Jamboree spending. One statute merely authorizes the DOD to lease its property to civilians, 10 U.S.C. § 2667, which Plaintiffs do not challenge.

The other statute merely authorizes DOD aid to civilians that is "incidental to military training." 10 U.S.C. § 2012(a). *See also id.* at § 2012(d)(1)(A)(ii) (limiting aid under this program by individual soldiers to "tasks directly related to the specific military occupational specialty of the member"). The DOD under this neutral statute has spent approximately $1 million to perform 15 construction projects at BSA summer camps (*e.g.*, building tent pads and storage sheds), which arguably helped military units train to perform comparable work near a battlefield. PF at ¶¶ 164-66 & Exhs. 49, 51. Until now, the DOD has never attempted to use this statute as authority for the DOD's Jamboree spending. *Id.* The DOD cannot do so now: the vast majority of the DOD's Jamboree spending – such as $500,000 to pay civilian contractors to put up tents, and $6,500 to purchase cookie dough – does not remotely advance military training. *See supra* Part I(B)(4).

Similarly, the DOD's Joint Ethics Regulation only authorizes the DOD to allow civilians to use military facilities and equipment, and to provide the services of DOD employees where "necessary to make proper use" of the equipment. *See* DB addendum at § 3-211(a). This does not authorize the challenged DOD spending.

Finally, Defendant argues that the DOD can support the Jamboree without the Jamboree Statute, because the DOD did so for 35 years before Congress enacted that Statute in 1972. DB at 32-33 n.6, 38. However, there is no record evidence regarding the quality or quantity of the DOD's pre-1972 aid to the Jamboree. *Cf.* DSA69 at ¶ 8 (a DOD declaration laconically stating that DOD personnel provided undefined logistical and ceremonial support at the early Jamborees). Thus, Defendant has failed to show that the DOD policies of that era permit the special DOD treatment of the BSA that is the subject of this litigation, including the spending on civilian labor and goods. Moreover, Defendant's argument contradicts *Chao*, which held that federal taxpayers have standing to challenge an executive agency's expenditure of general appropriations that Congress did not earmark for a specific purpose. 2006 WL 73404, *5.

II. The BSA is religious.

The BSA is religious for purposes of Establishment Clause scrutiny of non-neutral government aid to the BSA, because of its exclusion of nonbelievers, *see infra* Part II(A), its mandatory religious oaths, *see infra* Part II(B), and its numerous other religious dimensions.[10] This

[10] These include the BSA's religious self-descriptions (DRPF at ¶¶ 52-53, 56, 60), religious rituals at BSA events (*id.* at ¶¶ 76-79, 82, 84, 89), the BSA's Declaration of Religious Principle (*id.* at ¶¶ 39-40), religious documents printed by the BSA (*id.* at ¶¶83, 90, 105, 107), religious requirements to advance in rank (*id.* at ¶¶ 92-94), the religious emblems program (*id.* at ¶¶ 95-99), the chaplain program (*id.* at 100-04), (Continued . . .)

conclusion is not diminished by the BSA's secular aspects. *See infra* Part II(C). The weight of legal authority supports this conclusion. *See infra* Part II(D). *Cf.* DB at 23, 41, 49.

A. Exclusion of nonbelievers.

The BSA excludes atheists and agnostics from youth membership and adult leadership in the Cub Scouts, Boy Scouts, and Venturers. DRPF at ¶¶ 44-49. In this respect, the BSA is fundamentally unlike the DOD, where "decisions concerning religion and other similar beliefs are personal and not within the purview of the military to dictate, advocate, or hinder," according to a DOD summary judgment declaration. DSA72 at ¶ 14. This exclusionary policy also distinguishes the BSA from the other two large national youth camping organizations, the Girl Scouts of America and Campfire USA, which do not exclude nonbelievers. DRPF at ¶¶ 50-51.

B. Mandatory religious oaths.

All BSA youth must subscribe to an oath in which the first promise is "to do my duty to God." DRPF at ¶¶ 30-32, 35-36, 38. The BSA describes "duty to God" as "the bedrock of Scouting's values." *Id.* at ¶ 54(a). *Cf.* DB at 3, 23, 55. Youth must agree in writing to live by the

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the effective control by organized religions over BSA leadership and policy (*id.* at ¶¶ 27, 66), and the use of the BSA as "a tool of religious ministry" by organized religions that charter one million BSA youth (PAF at ¶ 1). *See generally supra* at pp. 6-9.

Oath and thereafter must recite it at "virtually all" Troop meetings. DRPF at ¶¶ 42, 73(d).

In the light of all of the BSA's religious policies and practices, its mandatory religious oaths are not a form of "ceremonial deism," as Justice O'Connor recently explained that doctrine in her concurring opinion in *Elk Grove School District v. Newdow*, 542 U.S. 1, 36-41 (2004). *Cf.* DB at 56. While Justice O'Connor opined that the words "under God" in the Pledge of Allegiance are a form of ceremonial deism, and thus that the government may promote these words without violating the Establishment Clause, she explained that this was "a close question" and that the ceremonial deism doctrine applied to only "a discrete category of cases." *Id.* at 37.

First, a core element of ceremonial deism is that objectors may "avoid" and "opt out" from religious language to which they object. *Id.* at 43. For example, public school students may freely decline to recite the words "under God" in the Pledge of Allegiance. *Id.* Similarly, various governmental oaths contain the "optional" phrase "so help me God." *Id.* at 36 n.*. On the other hand, the BSA will expel any youth who refuses to recite the words "duty to God" in the BSA oath. DRPF at ¶ 44. *See also Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a state law

requiring a declaration of belief in God as a condition to hold public office).[11]

Second, ceremonial deism is "merely descriptive," and does not involve "an expression of individual submission to divine authority." *Elk Grove Sch. Dist.*, 542 U.S. at 40. For example, the "under God" language of the Pledge "purports only to identify the United States as a Nation subject to divine authority." *Id.* On the other hand, the BSA oaths require BSA youth to personally submit to divine authority: "*I* will do *my* best to do *my* duty to God." DRPF at ¶ 32 (emphasis added).

Third, an element of ceremonial deism is that "[a]ny religious freight the words may have been meant to carry originally has long since been lost." *Elk Grove Sch. Dist.*, 542 U.S. at 41. Here, on the other hand, the BSA presently "advocate[s] a devout belief in deity through the Scout Oath and Law." DRPF at ¶ 58 (quoting the BSA's Scoutmaster Handbook). *See also Sherman v. School Dist. 21*, 1993 WL 57522, *3 (N.D. Ill. Mar. 4, 1993) (Zagel, J.) (holding that the BSA oath is "unquestionably religious" and not a form of ceremonial deism).

C. The minimal relevance of the BSA's secular aspects.

Defendant and his *amici* emphasize the secular activities and lessons of the BSA, like camping and good citizenship. DB at 3-5, 7, 23,

[11] For this reason, the *mandatory* BSA oaths are fundamentally unlike the *optional* prayers that open legislative sessions. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

41-42, 54-55; BSA brief at 6-24; ACRU brief at 7-9. However, the gateway to all BSA secular activities and lessons, through which every youth must pass week after week, is the public profession of a personal "duty to God," on threat of expulsion. DRPF at ¶¶ 28-38, 41-44, 54, 72-73. This religious gateway at once excludes nonbelievers, induces undecideds to embrace religious belief, and inserts a mandatory religious ritual into the beginning of virtually all BSA gatherings.

Moreover, the BSA explains that its secular activities are only a means to teach religious values. *Id.* at ¶ 60-64. For example, its outdoor program "reinforces the religious nature of the Scouting program." *Id.* at ¶ 60.

D. Legal authority shows that the BSA is religious.

On the basis of careful analysis of a comprehensive factual record, two federal district courts recently concluded that the BSA is sufficiently religious to trigger Establishment Clause scrutiny of special government aid to the BSA: the decision below (DA29-36), and a similar decision in *Barnes-Wallace v. BSA*, 275 F. Supp. 2d 1259, 1270-73 (S.D. Cal. 2003), *appeal pending*, Nos. 04-55732, 04-56167 (9th Cir.).

This Court in two opinions about the BSA concluded that the BSA is religious. In *Welsh v. BSA*, 993 F.2d 1267 (7th Cir. 1993), this Court held that the BSA is a private club exempt from the federal ban on religious discrimination in public accommodations. Reaching this conclusion, this Court held that "[t]he purpose of Scouting" is to equip

youth "to fulfill their duty to God, to mature personally, and to help others." *Id.* at 1277. In *Sherman v. School District 21*, 8 F.3d 1160, 1165-67 (7th Cir. 1993), this Court held that a public school does not violate the Establishment Clause by granting the BSA equal access to public forums. Reaching this conclusion, this Court distinguished the BSA from "nonreligious" groups, and described the BSA's message as "religious." *Id.* at 1165-66.

Similarly, the Third and Fourth Circuits recently concluded that the BSA is religious, in two decisions involving equal access to public school forums by the religious Child Evangelism Fellowship ("CEF"). *See CEF of New Jersey v. Stafford Sch. Dist.*, 386 F.3d 514, 529-30 (3d Cir. 2004) (Alito, J.) (holding that the school improperly favored the "religious views" of the BSA over those of the CEF, and analyzing five religious aspects of the BSA); *CEF of Maryland v. Montgomery Pub. Schs.*, 373 F.3d 589, 593, 596 n.3, 601 (4th Cir. 2004) (three times describing the BSA as "religious").

Also instructive is *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996), which held that prison officials cannot compel inmates to participate in 12-step addiction-recovery programs, because such programs are religious. *Kerr* rejected the argument that 12-step programs are non-religious because they are non-denominational. *Id.* Thus, whether the BSA is non-denominational is moot. *Kerr* also shows

that Plaintiffs need only prove that the BSA is religious, and not also that it is a religion. *Cf.* FFML brief at 13-21.

This Court should disregard the contrary statements about the BSA in *Good News Club v. Ladue*, 859 F. Supp. 1239, 1247-49 (E.D. Mo. 1993), *rev'd on other grounds*, 28 F.3d 1501 (8th Cir. 1994), *Powell v. Bunn*, 59 P.3d 559, 578-80 (Or. Ct. App. 2002), and *Scalise v. BSA*, 692 N.W.2d 858, 871-72 (Mich. Ct. App. 2005). *Cf.* DB at 42; PLF brief at 17-18. These decisions cannot be reconciled with this Court's decisions in *Welsh*, *Sherman*, and *Kerr*, or the Third and Fourth Circuits' *CEF* decisions. Moreover, the decisions in *Good News Club* and *Scalise* failed to address the BSA's exclusion of nonbelievers, the mandatory nature of its religious oaths, and many of the other religious practices discussed above.[12]

III. The Jamboree Statute violates the Establishment Clause.

The Establishment Clause requires government aid programs to be neutral between religious and secular organizations. *See infra* Part III(A). Establishment Clause concerns are heightened where, as here, the

[12] This Court should also disregard the unfounded dicta about the BSA in cases where the BSA was not a party or an issue, and where there was no factual record about the BSA. *See Walz v. Tax Comm'n of New York*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring); *Berger v. Rensselaer Central Sch. Corp.*, 982 F.2d 1160, 1166 (7th Cir. 1993); *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1115 (7th Cir. 1986); *Jeldness v. Pearce*, 30 F.3d 1220, 1226 (9th Cir. 1994); *Lindenberg v. INS*, 567 F. Supp. 154, 158-59 (D.D.C. 1987); *Ford v. Manuel*, 629 F. Supp. 771, 778 (N.D. Ohio 1985); *Jacques v. Hilton*, 569 F. Supp. 730, 734 (D.N.J. 1983).

challenged activity is directed towards impressionable youth. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

The Jamboree Statute violates this neutrality principle by providing special DOD assistance to the BSA, which excludes nonbelievers. This special treatment includes a unique fiscal ratchet, under which Congress has prohibited the DOD from reducing its spending to support the BSA Jamboree, even in lean fiscal years when the government must reduce its aid to many other private groups. The DOD's special treatment of the BSA must be viewed from the perspective of a young nonbeliever who cannot join his friends at the DOD-underwritten Jamboree without first rejecting his own beliefs and adopting those of the BSA. *See infra* Part III(B).

The supposed military benefits of the Jamboree Statute do not undo this violation of the neutrality analysis. *See infra* Part III(C). Neither do other statutes that authorize inferior kinds of DOD assistance to other civilian organizations. *See infra* Parts III(D) & (E). Finally, the Jamboree Statute's non-neutrality unlawfully endorses religion. *See infra* Part III(F).

A. The Establishment Clause requires neutrality.

The parties agree that under *Agostini v. Felton*, 521 U.S. 203 (1997), government aid to private groups violates the Establishment Clause if it has the primary effect of advancing religion. DB at 39-40.

The parties further agree that under *Agostini,* government aid has this primary effect if it "result[s] in government indoctrination," or "define[s] its recipients by reference to religion." *Id.* If government aid is not neutral between religious and nonreligious groups, then it both results in government indoctrination and defines its recipients by reference to religion. *Mitchell v. Helms*, 530 U.S. 793, 829-30 (2000) (plurality). Accordingly, Defendant recognized below that the neutrality principle requires government aid programs to be "open to all." D176 at 25.

The Supreme Court recently reaffirmed that "the principle of neutrality" is "the touchstone" of Establishment Clause analysis, under which "the government may not favor . . . religion over irreligion." *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733, 2742 (2005). *See also Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment) (government must "effect no favoritism . . . between religion and nonreligion"); *Mitchell*, 530 U.S. at 809 (plurality) ("the principle of neutrality" requires that "the religious, irreligious, and areligious are all alike eligible for governmental aid"); *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (the Establishment Clause "guarantee[s] religious liberty and equality to . . . the atheist"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality) (government "may not place its prestige, coercive authority, or resources behind . . . religious belief in general"); *Torcaso*, 367 U.S. at 495 (government cannot "impose requirements which aid all religions as against non-believers");

Chao, 2006 WL 73404, *5 (government must "be neutral between religion and irreligion").

A critical aspect of this neutrality principle is that government aid must be made available "on the same terms" to religious and secular groups alike. *Mitchell,* 530 U.S. at 810 (plurality).

Courts have not hesitated to strike down non-neutral government support to religious but not secular organizations. *See, e.g.*, *Texas Monthly*, 489 U.S. at 5 (plurality) (striking down a tax exemption that benefited religious but not secular publications); *Foremaster v. City of St. George*, 882 F.2d 1485, 1488-89 (10th Cir. 1989) (striking down an electric subsidy to a single church); *Barnes-Wallace*, 275 F. Supp. 2d at 1276 (striking down exclusive lease negotiations between a city and the BSA regarding prime city parkland). Courts also regularly strike down non-neutral government support for some religious denominations but not others. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982) (striking down a denominational preference in charitable reporting rules); *Children's Healthcare Is A Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996) (striking down a denominational preference in Medicare and Medicaid reimbursement rules).

The decisions above establish that the neutrality principle is not limited to cases involving the government's educational aid to religious schools. *See also Bowen v. Kendrick*, 487 U.S. 589, 607-09 (1988) (applying the neutrality test to federal funding of adolescent sexuality

services). *Cf.* ACLJ brief at 2, 4, 6-9, 18-21; FFML brief at 10; Virginia brief at 12-13.

B. The Jamboree Statute violates the neutrality principle.

The Jamboree Statute singles out the religious BSA to receive special aid from the DOD at the BSA Jamboree, including "personnel services and logistical support." *See* 10 U.S.C. § 2554(g). Under the Statute, the DOD spent some $7 million on each of the last three Jamborees, and spent more than $29 million in the last two decades. DRPF at ¶¶ 112-13. No other organization can compete for DOD aid under this Statute. Accordingly, the Jamboree Statute plainly violates the Establishment Clause's neutrality requirement.[13]

Moreover, the Supreme Court in *Agostini* held that government aid has the unlawful primary effect of advancing religion if it creates a financial incentive to undertake religious indoctrination. 521 U.S. at 231. The Jamboree Statute does so. Only youth and adults who swear the required BSA religious oath may participate in the BSA Jamboree, and thereby enjoy the unique benefits provided by the DOD to the BSA under the Jamboree Statute. Thus, a young nonbeliever will have a

[13] Because the Jamboree Statute is non-neutral, this appeal does not implicate the pervasively sectarian doctrine, which concerns the exclusion of certain religious groups from neutral governmental benefits. *Cf.* DB at 50-51. Likewise, the non-neutrality of the Jamboree Statute means that Defendant is not aided by the legal principle that religious groups may receive most of the aid available under a neutral aid program. *See Agostini*, 521 U.S. at 229; *Zelman v. Simmons-Harris*, 536 U.S. 639, 655-58 (2002). *Cf.* DB at 44.

financial incentive to reject his convictions in favor of the BSA's religious beliefs, in order to join his friends at the exciting government-funded recreational activities at the Jamboree.

The non-neutrality of the Jamboree Statute contrasts sharply with the neutral government aid programs upheld in the past, including neutral programs under which the government enters contracts with religious groups. For example, the Supreme Court in *Mitchell* upheld educational aid that was "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion." 530 U.S. at 829-30 (plurality). *See also Agostini*, 521 U.S. at 222-32, 234-35 (upholding neutral educational aid); *Bowen,* 487 U.S. at 608-09 (upholding neutral grants for adolescent sexuality services); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding neutral educational aid); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upholding neutral grants for university buildings); *Hunt v. McNair*, 413 U.S. 734 (1973) (same); *Tilton v. Richardson,* 403 U.S. 672 (1971) (same); *American Jewish Cong. v. Corporation for Natl. & Cmty. Serv.*, 399 F.3d 351 (D.C. Cir. 2005) (upholding neutral community service aid); *Christian Science Reading Room v. San Francisco,* 784 F.2d 1010, 1015 (9th Cir. 1986) (upholding neutral rental of airport space); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (upholding neutral services for large gatherings on the National Mall). *Cf.* DB at 23-24, 47, 50; ACRU brief at 11; BSA brief at 33-34.

Not to the contrary is *Utah Gospel Mission v. Salt Lake City*, 425 F.3d 1249 (10th Cir. 2005), which upheld a no-bid contract with a church to extinguish a public easement on that church's own property. Here, the BSA has no special property claim on DOD services. Likewise, Defendant is not helped by *Hawley v. Cleveland*, 24 F.3d 814 (6th Cir. 1994), which upheld a no-bid contract with a church to build an airport chapel to accommodate free exercise. The Jamboree Statute does not accommodate free exercise: no government action burdens free exercise at the Jamboree, and the Jamboree Statute does not "remove burdens" on free exercise. *County of Allegheny*, 492 U.S. at 601 n.51. Also, the chapel in *Hawley* was open to everyone, *id.* at 819, unlike the Jamboree. Moreover, this case is unlike *Bradfield v. Roberts*, 175 U.S. 291, 299 (1899), where a church hospital receiving government aid – unlike the BSA – did not exclude nonbelievers from the benefit of that aid. *See also Bowen,* 487 U.S. at 609 (emphasizing this aspect of *Bradfield*). *Cf.* DB at 23.

The non-neutral Jamboree Statute is also an outlier from the body of neutral federal statutes authorizing the DOD to assist an array of qualifying civilian groups or individuals, and not just a single religious group. *Cf.* DB at 45-46. For example, 10 U.S.C. § 2012 authorizes the DOD to assist a host of enumerated religious and secular organizations, and additional organizations approved on a case-by-case basis. *See* 10 U.S.C. § 2012(e); 32 U.S.C. § 508(d). Another 17 statutes likewise

authorize neutral DOD aid to an array of qualifying private groups.[14] Here, only the BSA is eligible for funds, which by congressional mandate cannot be reduced. The small number of federal statutes that authorize DOD aid to one organization are fundamentally unlike the Jamboree Statute: first, the organizations in these statutes do not exclude nonbelievers from the benefits of this DOD aid; and second, the type of aid that the DOD may provide to the civilian group in these statutes is far narrower than the type of aid that the DOD may provide under the Jamboree Statute.[15]

The Jamboree Statute is not rendered neutral by the ability of the general public to visit the Jamboree. *Cf.* DB at 6 n.1; BSA brief at 8-9, 18, 21-24, 31, 34; AL brief at 13, 20; PLF brief at 3, 8. These non-Scout

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[14] *See* 10 U.S.C. § 2551 (recognized national veterans' associations and national youth athletic or recreation tournaments); 10 U.S.C. § 2323 (historically black colleges); 10 U.S.C. §§ 2556 & 2557 (homeless civilians); 10 U.S.C. § 2558 (national military associations); 10 U.S.C. § 2564 (civilian sporting events); 10 U.S.C. § 2647 (next-of-kin of missing servicemen); 10 U.S.C. § 2667 (civilian groups); 10 U.S.C. § 2694a (nonprofit conservation organizations); 10 U.S.C. § 4651 (certain educational institutions); 10 U.S.C. § 4652 (same); 10 U.S.C. § 4654 (same); 10 U.S.C. § 4656 (aviation schools); 10 U.S.C. § 4683 (recognized honor guards and national veterans' associations); 10 U.S.C. § 9305 (civilian flight instructors); 10 U.S.C. § 9653 (D.C. high schools); 32 U.S.C. § 509 (certain civilian youth).

[15] *See* 10 U.S.C. §§ 2552 & 2670 (transportation, equipment, and space for the Red Cross when it aids the military); 10 U.S.C. § 2553 (security and ceremonial activities for presidential inaugurations); 10 U.S.C. § 2555 (transportation for the Girl Scouts); 10 U.S.C. § 4778 (authorization to the YMCA to maintain buildings on military reservations to provide services to military members); 36 U.S.C. §§ 220102 & 220107 (resources for the USO).

visitors may only observe the Jamboree activities, and may not participate.[16] Any youth who wants to participate must first profess a personal "duty to God." The neutrality doctrine cannot tolerate such inferior access for nonbelievers. Indeed, the fact that hundreds of thousands of visitors view first-hand the federal government's special treatment of the BSA and its policy of religious exclusion compounds the Establishment Clause problem.

C. The supposed military benefits of the Jamboree Statute do not undo the Establishment Clause violation.

Defendant repeatedly asserts that the DOD's Jamboree spending yields recruitment, training, and other military benefits. DB at 2, 12-16, 21-22, 35, 43-44, 55. In fact, the Jamboree Statute does not limit DOD aid to the BSA to cases that actually provide military benefits, unlike other statutes authorizing DOD aid to civilians. *See, e.g.,* 10 U.S.C. § 2012(a). Thus, the DOD spends the vast majority of its Jamboree funds on temporary civilian labor and civilian goods – spending that neither

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[16] This restriction is stated on the BSA's publicly accessible website. *See* www.scouting.org/jamboree/bulletin/2005-07-b.html (a BSA Jamboree bulletin stating that "program areas and activities are restricted to Jamboree participants only," while visitors may "observe Scouts . . . in action" and view certain "program events"); www.scouting.org/jamboree/2005/askbob/ index.html (BSA Jamboree "Q&A" site stating that visitors may "view all of the Jamboree's activities and exhibits," while "participation is limited to Jamboree attendees"). This Court may take judicial notice of this fact. *See* Fed. R. Evid. 201(b)(2); *Laborer's Pension Fund v. Blackmore Sewer Constr., Inc.,* 298 F.3d 600, 607 (7th Cir. 2002).

trains military employees nor sends a recruitment message. *See supra* Part I(B)(4).

Even if DOD support for the Jamboree produces some limited military benefit, that does not justify providing such support pursuant to a non-neutral statute. Rather, the DOD could achieve its legitimate military objectives by means of a neutral statute. For example, if the DOD wants to train soldiers to provide logistical support at large civilian gatherings, and thereby achieve training or recruiting goals, then a neutral statute could authorize such DOD aid to the general public, and establish neutral criteria for the DOD to ration such support. Unlike the Jamboree Statute, such a neutral statute would satisfy the Establishment Clause. The competitive structure of a neutral statute would also promote economic efficiency in the allocation of scarce government resources.

Thus, the primary effect – indeed the *sole* effect – of handpicking the BSA through the non-neutral Jamboree Statute instead of allowing competition under a neutral statute is to give special treatment to the BSA and thereby to advance religion.

D. The Jamboree Statute itself, and not the U.S. Code taken as a whole, must be neutral.

Defendant attempts to dodge the Jamboree Statute's blatant non-neutrality by citing other support that the DOD provides to secular organizations under other statutes. DB at 10, 22-23, 45-46, 48; BSA brief at 1-6. Defendant essentially argues that the Establishment Clause

requires only that the U.S. Code taken as a whole be neutral, while individual statutes may lawfully be non-neutral.

This contradicts the Establishment Clause's plain language: "Congress shall make no *law* respecting an establishment of religion." U.S. Const. amend. I (emphasis added). The word "law" is used in the singular, as opposed to the plural word "laws," or a similar word such as "code." The authors of the Constitution knew how to use the word "laws" in the plural. *See id.* art. I, § 8, cl. 18 ("The Congress shall have the power . . . [t]o make all *laws* which shall be necessary and proper") (emphasis added); *id.* art. VI, cl. 2 ("This Constitution, and the *laws* of the United States . . . shall be the supreme law of the land") (emphasis added). Thus, each individual "law" must pass muster under the Establishment Clause.

Defendant's theory also contradicts the Supreme Court's neutrality jurisprudence. Under *Mitchell,* government must offer aid "on the same terms" to religious and secular groups alike. 530 U.S. at 810 (plurality). Here, Congress has established a special pot of money to fund activities solely for youth who are willing to swear their devotion to God. It is not sufficient for Establishment Clause purposes that secular groups can compete for different or inferior aid, because such groups will not receive aid "on the same terms" as the religious BSA. Also, under *Agostini,* government aid cannot create financial incentives to undertake religious indoctrination. 521 U.S. at 231. The forbidden financial incentives

created by the Jamboree Statute, *see supra* Part III(B), are not diminished by the availability of different or inferior aid under other statutes.

Defendant's theory would allow Congress to enact all kinds of obviously non-neutral aid statutes, so long as it could cite separate statutes providing inferior though marginally related aid. One statute might authorize HUD to construct buildings exclusively for the Episcopal church, so long as other statutes allowed HUD to provide building loans to all private organizations. Another statute might provide merit scholarships exclusively to students attending religious colleges, so long as other statutes provide need-based financial aid to all college students. Of course, neither of these non-neutral statutes could survive existing Establishment Clause jurisprudence.

E. The Jamboree Statute provides superior aid to the BSA than the other statutes provide to other groups.

Even if neutrality analysis of the Jamboree Statute extends beyond the face of the Statute to consideration of other statutes, the DOD aid to the BSA under the Jamboree Statute is of far higher value, while the DOD aid to other groups under other statutes is of far lower value.[17]

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[17] Defendant bears the burden of proof on this point. Specifically, when government attempts to defend a non-neutral statute by comparing it to a neutral statute, government must bear the burden of proving that aid under the neutral statute is available "on the same terms," *Mitchell*, 530 U.S. at 810 (plurality), as aid under the Jamboree Statute. *Cf. Johnson v. California*, 125 S. Ct. 1141, 1149 (2005) (holding that when a government policy is facially non-neutral with regard to race, the (Continued . . .)

First, Congress last year amended the Jamboree Statute to create a fiscal ratchet, under which the DOD cannot spend less on a Jamboree than it spent on the prior Jamboree, unless Defendant reports a finding to Congress that doing so would endanger national security. 10 U.S.C. § 2554(i). The current baseline for the DOD's Jamboree spending, which by this Statute can go up but not down, is $7 million per Jamboree. DRPF at ¶¶ 112-13. No other statute authorizing the DOD to assist private organizations contains a comparable fiscal ratchet. Thus, during lean fiscal years that require the DOD and all other units of the federal government to spend less to assist private entities of all kinds, the Jamboree Statute will provide the BSA with unique protection for its special slice of the federal budget.

Second, the assistance provided by the DOD to the BSA under the Jamboree Statute – unrestricted "personnel services and logistical support" worth $7 million per Jamboree, most of which is spent on temporary civilian labor and civilian goods – is far more expansive and favorable than the limited assistance provided by the DOD to other civilian organizations under other statutes. Indeed, Defendant

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government bears the burden of satisfying strict scrutiny). Otherwise, plaintiffs would face the virtually impossible task of obtaining spending and other information about every government aid program that is conceivably analogous to the challenged program.

Also, plaintiffs do not bear the burden of proving that the DOD has denied a civilian group's request for assistance (DB at 46): the rational decisions of third parties not to seek aid to which they are not legally entitled cannot save the Jamboree Statute.

acknowledged below that DOD support to the BSA under the Jamboree Statute is "somewhat unique." D174 at 24.

For example, 10 U.S.C. § 2012(a) authorizes aid only when it is "incidental to military training." The Jamboree Statute lacks this critical limit. Other statutes merely authorize the DOD to convey or loan personal or real property to civilian groups, which is not in dispute here.[18] Still other statutes only authorize the DOD to provide tightly defined transportation, security, and/or ceremonial services to civilian groups – none of which allows spending on civilian labor and goods, as the Jamboree Statute does.[19] The remainder of these DOD aid statutes are otherwise far narrower than the Jamboree Statute.[20]

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[18] *See* 10 U.S.C. § 2551 (loans of equipment and barracks to veterans' and youth groups); 10 U.S.C. § 2667 (lease of military property to private groups); 10 U.S.C. § 2694a (conveyance of real property to conservation groups); 10 U.S.C. § 4651 (loans or conveyance of equipment to certain schools); 10 U.S.C. § 4652 (same); 10 U.S.C. § 4654 (same); 10 U.S.C. § 4656 (same); 10 U.S.C. § 4683 (loans or conveyance of ceremonial equipment to honor guards and veterans' groups); 10 U.S.C. § 9653 (conveyance of equipment to certain schools).

[19] *See* 10 U.S.C. § 2553 (security and ceremonial services at Presidential inaugurations); 10 U.S.C. § 2555 (transportation for the Girl Scouts); 10 U.S.C. § 2564 (security services at sporting events); 10 U.S.C. § 2647 (transportation for the next-of-kin of missing soldiers).

[20] *See* 10 U.S.C. § 2323 (technical assistance to historically black colleges); 10 U.S.C. §§ 2552 & 2670 (transportation, equipment, and space to the Red Cross when it assists the military); 10 U.S.C. §§ 2556 & 2557 (shelter and services for the homeless); 10 U.S.C. § 2558 (services provided to annual gatherings of national military associations); 10 U.S.C. § 4778 (authorizing the YMCA to maintain buildings on military reservations to provide services to soldiers); 10 U.S.C. § 9305 (training to (Continued . . .)

Third, the DOD spent some $7 million on each of the last three Jamborees. DRPF at ¶¶ 112-13. There is no record evidence that the DOD has spent a comparable amount to assist a comparable organization or event under any other statute. Rather, the DOD's summary judgment declaration contains the conclusory assertion that the DOD supports other civilian groups under other statutes, but fails to provide any specificity regarding the quantity or quality of that support, and certainly does not suggest that the DOD spends millions of dollars to pay for civilian labor and goods under other statutes to assist other groups. *Cf.* DB at 46. Likewise, the two accounting records cited by the BSA are too fragmentary and confusing to assist Defendant. BSA brief at 4-5. The Defendant's failure of proof dooms his argument regarding statutes other than the Jamboree Statute.

F. The Jamboree Statute unlawfully endorses religion.

Courts generally use the neutrality test to analyze government support to private religious organizations. *See, e.g., Mitchell*, 530 U.S. at 829-30; *Bowen*, 487 U.S. at 608. On the other hand, courts generally use the endorsement test to analyze the government's expression of its own religious messages. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny*, 492 U.S. 573. *See generally Board of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J.,

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civilian flight instructors); 36 U.S.C. §§ 220102 & 220107 (resources for the USO).

concurring) (explaining that the "endorse[ment]" test applies to "government speech on religious topics," while the "neutral[ity]" test applies to "special benefits" from the government to particular groups). Accordingly, neutrality is the appropriate inquiry here. *Cf.* ACLJ brief at 2, 4, 6-9.

In any event, non-neutral aid to religion violates the endorsement test. *See Texas Monthly*, 489 U.S. at 17 (plurality) (explaining that a non-neutral statute that gave religious but not secular periodicals a tax exemption "effectively endorse[d] religious belief"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (explaining that a statute entitling employees to take religious but not nonreligious days off unlawfully endorsed religion); *Barnes-Wallace*, 275 F. Supp. 2d at 1276 (holding that exclusive negotiations by a city with the BSA regarding prime parklands unlawfully endorsed religion). *See also Agostini*, 521 U.S. at 235 (holding that for the same reasons government aid was neutral, it did not endorse religion); DB at 39 n.7, 54-55 (acknowledging this aspect of *Agostini*).

Here, the Jamboree Statute endorses religion. A reasonable observer would know the following: The Jamboree Statute authorizes the DOD to provide support only to the BSA Jamboree. No other statute authorizes comparable aid to comparable groups. The DOD spends $7 million per Jamboree, and by law cannot spend less. The BSA excludes nonbelievers from the enjoyment of this unique and robust DOD

spending. From these facts, the reasonable observer would conclude that the Jamboree Statute endorses religion. *Cf.* DB at 55; ACLJ brief at 9-13; BSA brief at 39-40; PLF brief at 4-15.

Not to the contrary is Justice Breyer's opinion concurring in the judgment in *Van Orden*, 125 S. Ct. at 2868-72, which provided the fifth vote to sustain the Ten Commandments display on the Texas capitol grounds. Justice Breyer reasoned that the private group that donated the display had a secular purpose; that the grounds that included the display also included dozens of secular monuments, and were not public school grounds primarily used by the "impressionab[le]" young; that the 40-year absence of litigation against the display indicated that the public perceived the display as expressing a secular message; and that a contrary ruling might lead to religiously divisive litigation against comparable displays on public property "across the Nation." *Id.* at 2870-71.

Justice Breyer's *Van Orden* concurrence does not support the Defendant's argument that decades of litigation-free DOD support for the Jamboree starting in 1937 shows that such support is lawful. *Cf.* DB at 56; AL brief at 11-12. First, unlike the display in *Van Orden*, the BSA's exclusion of nonbelievers is unquestionably religious in purpose and effect. Second, the display in *Van Orden* did not implicate impressionable youth, while the DOD spending here does. Third, a private group in *Van Orden* on one occasion donated the contested

display to the government, while here the government year after year is donating some $2 million in spending to a private group. Fourth, *Van Orden* implicated hundreds of nearly identical Ten Commandments displays on other government properties, while the special treatment here of the religious BSA is highly unusual, and thus raises no floodgates concerns. Fifth, *Van Orden* involved the government's expression of its own messages, while this case involves government aid to a private religious group. In short, Justice Breyer's *Van Orden* concurrence does not suggest that the passage of time without litigation can justify the Jamboree Statute's blatant violation of the neutrality requirement.[21]

[21] Even if the passage of time without litigation is relevant here, the important year is 1985, when the BSA's expulsion of youth member Paul Trout initiated the first general public discussion of the BSA's policy of religious exclusion. *See, e.g.*, Jay Mechling, *On My Honor: Boy Scouts and the Making of American Youth* 35 (2001) (discussing this episode). This lawsuit regarding governmental favoritism towards the BSA was filed in 1999, only 14 years later.

CONCLUSION

Plaintiffs respectfully request that this Court affirm the district court's award to Plaintiffs of summary judgment, a declaratory judgment, and an injunction regarding the Jamboree Statute.

Dated: January 26, 2006 Respectfully submitted,

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STATEMENT REGARDING LENGTH OF BRIEF

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that the foregoing brief complies with the volume limitations of Rule 32(a)(7)(B)(I) in that the brief contains 13,960 words, as measured by the word-processing system used to prepare the brief.

Dated: January 26, 2006

/s/ Adam Schwartz
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PROOF OF SERVICE

I, Adam Schwartz, an attorney, hereby certify that I caused two copies of the foregoing Brief of Plaintiffs-Appellees and an electronic version to be served upon the following individuals by Federal Express for overnight delivery.

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