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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

12 **LORI & LYNN BARNES-WALLACE,**  
13 **ET AL.,**

14 **Plaintiffs,**

15 **v.**

16 **BOY SCOUTS OF AMERICA, ET AL.,**

17 **Defendants.**

Civil No.00CV1726-J (AJB)

**ORDER:**

(1) **GRANTING IN PART AND DENYING IN PART FURTHER CROSS-MOTIONS FOR SUMMARY JUDGMENT;**

(2) **DENYING MOTIONS TO STRIKE; AND**

(3) **DENYING PLAINTIFFS' MOTION FOR ENTRY OF FINAL JUDGMENT UNDER RULE 54(b).**

[Doc. Nos. 237, 247, 250, 274, 277, 294.]

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21 **Before the Court are cross-motions for summary judgment involving the City of San**  
22 **Diego's (the "City") long-term lease with the Desert-Pacific Council, Boy Scouts of America**  
23 **("BSA-DPC" or "Boy Scouts") for a half acre parcel of public parkland located on Fiesta Island**  
24 **in Mission Bay Park. [Doc. Nos. 237, 250.] Also before the Court is a motion for entry of final**  
25 **judgment under Fed. R. Civ. P. 54(b) filed by Plaintiffs Lori and Lynn Barnes-Wallace and their**  
26 **son and Michael and Valerie Breen and their son ("Plaintiffs") stemming from a settlement**  
27 **agreement entered into between Plaintiffs and the City. [Doc. No. 247.] Defendant City joins in**  
28 **Plaintiffs' motion for final judgment under Rule 54(b). [Doc. No. 262.] Each of the motions is**

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1 fully-briefed and came on regularly for hearing on April 5, 2004. M. Andrew Woodmanscc,  
2 Jordan Budd and M.E. Stephens appeared on behalf of Plaintiffs. John Mullen appeared on  
3 behalf of the City, and George Davidson and Scott Christensen appeared on behalf of the Boy  
4 Scouts. After hearing oral argument, the Court took the motions under submission. For the  
5 reasons set forth below, the Court (1) **GRANTS** Plaintiffs' cross-motion for summary judgment  
6 on their claims that the Fiesta Island lease violates the Establishment Clause of the federal  
7 constitution and the No Aid and No Preference Clauses of the California state constitution; (2)  
8 **DENIES** the cross-motions on Plaintiffs' claims that the Fiesta Island lease violates their equal  
9 protection rights under the federal and state constitutions as moot; and (3) **DENIES** Plaintiffs'  
10 motion for entry of final judgment under Rule 54(b) lease as moot.

#### 11 12 *Procedural History*

13 On May 13, 2002, Plaintiffs, a lesbian and an agnostic couple and their Boy Scout-aged  
14 sons, filed a First Amended Complaint alleging that the City's long-term leases of public  
15 parkland in Balboa Park and Mission Bay Park are (1) an unconstitutional establishment of  
16 religion under the federal and state constitutions, U.S. Const. amend. I, XIV; 42 U.S.C. § 1983;  
17 Cal. Const. art. I, § 4; (2) violate the state constitution's prohibition against the provision of  
18 financial support for religion, Cal. Const. art. XVI, § 5; (3) violate their equal protection rights  
19 under the federal and state constitutions, U.S. Const. amend. XIV; 42 U.S.C. § 1983; Cal. Const.  
20 art. I, § 7; and (4) violate the City's common law duty to maintain public parkland for the benefit  
21 of the general public. On July 31, 2003, all parties moved for summary judgment on all claims.  
22 In an order dated July 31, 2003, the Court (1) granted Plaintiffs' cross-motion for summary  
23 judgment on their claims that the Balboa Park lease violated the Establishment Clause of the  
24 federal constitution, as well as the No Aid and No Preference Clauses of the California state  
25 constitution; (2) granted the BSA-DPC's and the City's cross-motions for summary judgment on  
26 Plaintiffs' claim that the parkland leases violated state common law; and (3) denied cross-  
27 motions for summary judgment on all other claims. (See Order Granting in Part and Den. in Part  
28 Cross-Mots. for Summ. J.); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259

1 (S.D. Cal. 2003). The Court was unable to determine whether the Fiesta Island lease violates the  
2 Establishment Clause and the California Constitution's Religion Clauses because insufficient  
3 evidence was submitted regarding the process by which the City leased the Fiesta Island property  
4 to the BSA-DPC. *Barnes-Wallace*, 275 F. Supp. 2d at 1276, 1279, 1280. Similarly, the Court  
5 was unable to determine as a matter of law whether Defendants' activities violated the federal  
6 and California Equal Protection Clauses, as there were material facts in dispute. *Id.* at 1280-85.  
7 Accordingly, in the cross-motions currently before the Court, the parties seek summary judgment  
8 with respect to the Fiesta Island lease.<sup>1</sup>  
9

### 10 *Background Facts*

11 In November 1987, the City entered into a 25-year lease with the BSA-DPC for a half  
12 acre parcel of public parkland located on Fiesta Island in Mission Bay Park at no charge. (Pls.'  
13 Separate Statement of Undisputed Material Facts ("SSUMF") ¶ 5.) The City Council approved  
14 the lease "for the purposes of constructing, maintaining, and operating an aquatic safety training  
15 and recreational center in boating, sailing and water sports[.]" (Decl. of Lincoln R. Ward  
16 ("Ward Decl.") ¶ 14; *see also* Decl. of Elvira Cacciavillani ("Cacciavillani Decl."), Ex. 3  
17 ("Fiesta Island Lease") § 1.02.) Pursuant to the lease, the BSA-DPC was required to expend  
18 \$1.5 million to build and endow the Youth Aquatic Center as part of a \$4 million capital  
19 campaign. (Fiesta Island Lease § 7.19.) Accordingly, the BSA-DPC constructed an aquatic  
20 facility that offers a variety of aquatic-related youth activities. (SSUMF ¶ 7; BSA-DPC's Resp.  
21 to Pls.' SSUMF ("Resp. to SSUMF") ¶ 7.)

22 The lease permits the BSA-DPC to "use/book" up to "75% of all available aquatic  
23 activities up to 7 days prior." (SSUMF ¶ 9; Resp. to SSUMF ¶ 9.) Moreover, the lease requires  
24 that the BSA-DPC send a letter annually to all members of the Youth Aquatic Advisory Council  
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26 <sup>1</sup> The BSA-DPC appealed that part of the motion granting Plaintiffs' cross-motion for summary  
27 judgment and denying its cross-motion for summary judgment on claims relating to the Balboa Park  
28 lease. (*See* Not. of Appeal.) On January 12, 2004, the Court received notice that the appeal had been  
dismissed for lack of jurisdiction.

1 advising them of the operation and procedures for using the facility “[i]n order to give all groups  
2 an equal chance to use the Youth Aquatic Facility[.]” (SSUMF ¶ 12; Resp. to SSUMF ¶ 12.)  
3 Similar to the Balboa Park lease, the Fiesta Island Lease also includes a nondiscrimination  
4 clause requiring that the BSA-DPC

5 not . . . discriminate in any manner against any person or persons on account of race,  
6 marital status, sex, religious creed, color, ancestry, national origin, age, or physical  
7 handicap in [its] use of the premises, including but not limited to the providing of goods,  
8 services, facilities, privileges, advantages, and accommodations[.]

9 (SSUMF ¶ 14; Resp. to SSUMF ¶ 14.) On July 2, 1992, in conjunction with the opening of the  
10 Youth Aquatic Center, the City Manager sent a letter to the BSA-DPC, stating that the City  
11 would “not allow any discrimination on any basis including sexual orientation in the use or  
12 occupancy of any City-owned property leased to the Boy Scouts of America or any other  
13 organization using City-owned property” and that the lease prohibited such discrimination.  
14 (SSUMF ¶ 15; Resp. to SSUMF ¶ 15.) Nevertheless, both the City and the BSA-DPC construe  
15 the non-discrimination clauses as a regulation of access to the property by other individuals, as  
16 opposed to the Boy Scouts’ membership policies. (Resp. to SSUMF ¶ 14.)

### 17 *Discussion*

#### 18 **I. Legal Standard**

19 Summary judgment is appropriate if the “pleadings, depositions, answers to  
20 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
21 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
22 of law.” Fed. R. Civ. P. 56(c). A party seeking summary judgment always bears the initial  
23 burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,  
24 477 U.S. 317, 323 (1986). The moving party can satisfy this burden in two ways: by presenting  
25 evidence that negates an essential element of the nonmoving party’s case, or by demonstrating  
26 that the nonmoving party failed to make a showing sufficient to establish an element essential to  
27 that party’s case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the  
28 moving party fails to discharge this initial burden, summary judgment must be denied and the

1 court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S.  
2 144, 159-60 (1970).

3 If the moving party meets this initial burden, the nonmoving party cannot defeat summary  
4 judgment merely by demonstrating "that there is some metaphysical doubt as to the material  
5 facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986);  
6 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson v.*  
7 *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)) ("The mere existence of a scintilla of evidence in  
8 support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must  
9 "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to  
10 interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine  
11 issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). When making this  
12 determination, the court must view all inferences drawn from the underlying facts in the light  
13 most favorable to the nonmoving party. See *Matsushita*, 475 U.S. at 587. "Credibility  
14 determinations, the weighing of evidence, and the drawing of legitimate inferences from the  
15 facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for  
16 summary judgment." *Anderson*, 477 U.S. at 255.

## 17 18 **II. Federal Establishment Clause**

19 Under the federal constitution's Establishment Clause, "Congress shall make no law  
20 respecting an establishment of religion." U.S. Const. amend. I. The purpose of the  
21 Establishment Clause is to prohibit state sponsorship, financial support and active involvement  
22 in religious activity. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Under the test currently  
23 utilized by the Supreme Court, government action does not violate the Establishment Clause if  
24 (1) the action has a secular purpose, and (2) its principal or primary effect is one that neither  
25 advances nor inhibits religion. *Id.* at 612-13; *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997);  
26 *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000). At issue here is whether the City's lease of  
27 public parkland in Mission Bay Park to the BSA-DPC has the principal or primary effect of  
28 advancing religion.

1 To determine whether government aid has the effect of advancing religion, courts now  
2 consider whether the aid program (1) results in governmental indoctrination; (2) defines its  
3 recipients by reference to religion; or (3) creates an excessive entanglement. *Agostini*, 521 U.S.  
4 at 234. When government "aid is allocated on the basis of neutral, secular criteria that neither  
5 favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a  
6 nondiscriminatory basis[,] . . . the aid is less likely to have the effect of advancing religion"  
7 because it is less likely to result in state-sponsored indoctrination or the creation of a symbolic  
8 union between government and religion. *Id.* at 231. According to the plurality in *Mitchell*, if the  
9 government aids indoctrination to a broad range of recipients, it cannot be said that the  
10 government is responsible for indoctrination by any one recipient. 503 U.S. at 809. In other  
11 words, aid is neutral if the religious, irreligious and arreligious are equally eligible. *Id.* Although  
12 Justice O'Connor in her concurrence rejected the plurality's invitation to give the principle of  
13 "neutrality" an almost singular degree of importance in Establishment Clause inquiries, she  
14 agrees that neutrality is "an important reason for upholding government-aid programs against  
15 Establishment Clause challenges." *Id.* at 837-39.

16 Similar to the Balboa Park lease, Plaintiffs argue that the Fiesta Island lease has the  
17 primary effect of advancing religion because it constitutes aid given directly to a religious  
18 organization and is not aid allocated on the basis of neutral, secular criteria. Plaintiffs assert that  
19 the Mission Bay Park lease is naturally perceived by a reasonable observer as an endorsement of  
20 the entire regional program of Scouting, which has as its purpose the inculcation of religious  
21 belief and observance in youth. According to Plaintiffs, the "reasonable observer" would  
22 conclude that the Fiesta Island lease is used to advance religious indoctrination. The BSA-DPC,  
23 however, contends that the lease does not have the primary effect of advancing religion.<sup>2</sup>  
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26 <sup>2</sup> In the July 31, 2003 Order, the Court already concluded that the BSA-DPC is a religious  
27 organization and that the City's lease of public parkland to a religious organization raises Establishment  
28 Clause concerns. *Barnes-Wallace*, 275 F. Supp. 2d at 1270-73.

1           **A. Whether a reasonable observer would perceive an advancement of religion as**  
2           **a result of the City's failure to use a neutral process in selecting lessees**

3           When determining whether an aid program has the primary effect of advancing religion,  
4 the Court asks whether a "reasonable observer" would perceive an advancement of religion  
5 through government aid. *Mitchell*, 530 U.S. at 843; *Capitol Square Review and Advisory Bd. v.*  
6 *Pinette*, 515 U.S. 753, 780 (1995); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S.  
7 481, 493 (1986). The "reasonable observer" perspective establishes at least some measure of  
8 objectivity because the "reasonable observer" is "deemed aware of the history and context of the  
9 community and forum" in which the Establishment Clause challenge arises. *See Good News*  
10 *Club v. Millford Cent. Sch.*, 533 U.S. 98, 119 (2001); *see also Pinette*, 515 U.S. at 780. In order  
11 to determine whether a reasonable observer would perceive an advancement of religion, the  
12 Court must first ascertain whether the Fiesta Island lease was made available on a neutral basis.

13           Since the 1970s, the Boy Scouts sought to develop an aquatic facility for scouting youth.  
14 (SSUMF ¶ 23; Resp. to SSUMF ¶ 23.) After an unsuccessful attempt in establishing a  
15 waterfront location on Harbor Island in downtown San Diego in 1977, the Boy Scouts found a  
16 suitable location on Fiesta Island in the 1980s. (SSUMF ¶¶ 24-25; Resp. to SSUMF ¶¶ 24-25.)  
17 According to Plaintiffs, the BSA-DPC, then known as the San Diego County Council, Boy  
18 Scouts of America, approached the City concerning the possibility of leasing property in Mission  
19 Bay Park in 1986. (SSUMF ¶ 29.) Negotiations with the BSA-DPC, according to Plaintiffs,  
20 began after the City was notified that a Boy Scouts benefactor wished to donate the funds to  
21 construct an aquatic facility. (*Id.* ¶ 29(a).) Relying on the declaration of Michael J. Behan, the  
22 Mission Bay Park Manager from August 1986 to January 1997 who was responsible for  
23 negotiating the Fiesta Island lease with the BSA-DPC on behalf of the City, the lease was  
24 negotiated exclusively with the BSA-DPC. (*Id.* ¶ 29(b); *see also* Decl. of Michael J. Behan  
25 ("Behan Decl.") ¶ 6.) No other organizations were involved in the lease negotiations. (*Id.*)

26           After receiving advice that approval of the lease was more likely to occur if other youth  
27 organizations supported the BSA-DPC's plans, Mr. Behan avers that other youth-serving groups  
28 expressed their support for the Fiesta Island lease. (SSUMF ¶ 29(c); *see also* Decl. of M.

1 Andrew Woodmanssee in Supp. of Pls.' Opp'n to BSA-DPC's Mot. for Summ. J., Ex. 1 at 4  
2 (November 24, 1986 letter from the Girl Scouts expressing approval of the "proposal by the  
3 Aquatic Facility Committee of the Boy Scouts regarding development of a youth aquatics facility  
4 . . . on Fiesta Island"). Acting under the name "Fiesta Island Youth Facility Committee,"  
5 several youth-oriented community groups in San Diego organized themselves for the purpose of  
6 developing a community youth aquatic facility on Fiesta Island. (Def. BSA-DPC's Mem. of P.  
7 & A. in Supp. of Further Mot. for Summ. J. ("BSA-DPC P. & A.") at 7; Ward Decl. ¶ 6.) In  
8 fact, Lincoln R. Ward, President of the San Diego County Council from 1986 to 1988, identifies  
9 42 youth-oriented community organizations in San Diego that had representatives in the Fiesta  
10 Island Youth Facility Committee. (Ward Decl. ¶ 6.) The Committee proposed that the City  
11 execute a long-term agreement with the BSA-DPC, as it was an organization that could fund,  
12 operate and maintain an aquatic center. (Ward Decl., Ex. 1.; *see also* SSUMF ¶ 30 ("Boy Scouts  
13 had proved able to manage a facility like the [Youth Aquatic Center] because they were already  
14 running Camp Balboa in Balboa Park.")) Similarly, the Committee determined that it would be  
15 undesirable and inefficient for the City to execute agreements with multiple organizations.

16 The BSA-DPC disputes Plaintiffs' characterization of the events leading up to the  
17 execution of the lease in November 1987. According to the BSA-DPC, negotiations for the  
18 Mission Bay Park lease were not exclusive. (BSA-DPC P. & A. at 8, 17; Resp. to SSUMF ¶ 29.)  
19 The BSA-DPC claims that the Fiesta Island Youth Facility Committee negotiated with the  
20 Mission Bay Park Committee and its Master Plan Subcommittee, the Park and Recreation  
21 Committee, the Police Department, and the City Council in a series of public hearings over  
22 several years. (BSA-DPC P. & A. at 8; Ward Decl. ¶¶ 7-11.) In support of this position, the  
23 BSA-DPC rely on Mr. Ward's declaration. (*See* Ward Decl. ¶ 1; *see also* Decl. of Fred R. Day ¶  
24 9.) According to Mr. Ward, the Youth Facility Committee was instrumental in the City's  
25 approval of a permanent building on Fiesta Island "to store and secure sailboats and related  
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1 equipment and space for some classroom or other sit-down instruction in preparation for the  
2 activities there.”<sup>3</sup> (*Id.* ¶ 8-11.)

3 In addition to Mr. Ward’s declaration, the BSA-DPC has submitted evidence of multiple  
4 City Manager reports. In a March 20, 1987 City Manager’s Report, then-Deputy City Manager  
5 Jack McGrory recommended that the City’s Public Facilities and Recreation Committee approve  
6 plans for a youth aquatic facility proposed by the Fiesta Island Youth Facility Committee and  
7 “direct the City Manager to negotiate with the Youth Facility Committee.” (Resp. to SSUMF ¶  
8 29; Decl. of Scott Christensen in Opp’n to Pls.’ Mot. for Summ. J. (“Christensen Decl.”), Ex. 1.)  
9 Moreover, in an October 6, 1987 City Park and Recreation Board Report signed by then-Park  
10 and Recreation Director George I. Loveland, but believed by the BSA-DPC to have been written  
11 by Mr. Behan, there is evidence that the “Youth Aquatic Facility Committee” presented  
12 information relating to their proposal for a youth aquatic center to the Mission Bay Park  
13 Committee on December 2, 1986, February 3, 1987, April 7, 1987, and August 4, 1987; and to  
14 the Public Facilities and Recreation Committee on March 29, 1987. (Christensen Decl., Ex. 2.)  
15 There is also evidence from a March 25, 1987 San Diego City Council Public Facilities and  
16 Recreation Committee Meeting addressing “a proposal by the Fiesta Island Youth Facility  
17 Committee.” (Cacciavillani Decl., Ex. 16 at 304; Resp. to SSUMF ¶ 28.) In a November 19,  
18 1987 City Manager Report, Mr. McGrory described the proposed youth aquatic center as having  
19 “a long and complex history, involving 9 reviews at publicly noticed meetings and numerous  
20 compromises.” (Christensen Decl., Ex. 3 at 28.) Additionally, while Plaintiffs claim that the  
21 Fiesta Island Youth Facility Committee was not organized until after the BSA-DPC approached  
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23 <sup>3</sup> Plaintiffs object to portions of the declarations of Lincoln Ward and Fred Day on the grounds  
24 that they constitute hearsay, conjecture and speculation. [Doc No. 277.] Accordingly, Plaintiffs request  
25 that the Court strike these portions from the record. “[O]pposing affidavits shall be made on personal  
26 knowledge, shall set forth such as would be admissible in evidence, and shall show affirmatively that the  
27 affiant is competent to testify to matters stated therein.” Fed. R. Civ. P. 56(e). Because the Court has  
28 not relied on those portions Plaintiffs find objectionable, Plaintiffs’ objections are **OVERRULED** and  
the motion to strike is **DENIED** as moot. The Court likewise **OVERRULES** the BSA-DPC’s  
objections to Exhibits 41 and 48 of the declaration of Elvira Cacciavillani on identical grounds. [Doc.  
No. 274.]

1 the City in 1986, there is evidence in the Committee's proposal itself that the group may have  
2 been in existence for at least ten years.

3 Although the evidence submitted by the BSA-DPC does indicate that the Fiesta Island  
4 Youth Facility Committee assisted in obtaining approval for limited permanent buildings on  
5 Fiesta Island, *i.e.*, the Youth Aquatic Center, there is no evidence that the lease itself was  
6 negotiated with any entity other than the BSA-DPC. In its previous order, the Court provided a  
7 detailed description of the process by which the City leases property, which was in effect prior to  
8 the 1987 lease with the BSA-DPC. (SSUMF ¶ 34; Resp. to SSUMF ¶ 34.) This depiction was  
9 based upon the deposition of William T. Griffith, the City's Real Estate Assets director.  
10 According to his testimony, once City property is available for leasing, Real Estate Assets will  
11 attempt to get a sense from the Mayor or City Council as to what should be done with the  
12 property. *Barnes-Wallace*, 275 F. Supp. 2d at 1275. Once the City's intentions are known, Real  
13 Estate Assets will either solicit interest in the property via a request for proposal ("RFP") that  
14 includes selection criteria, or recommend an exclusive negotiation with a specific prospective  
15 lessee. *Id.* at 1274. Similar to the Balboa Park lease, the City did not implement its RFP process  
16 for generating interest and soliciting competitive bids with respect to the Fiesta Island property.  
17 (SSUMF ¶ 35; Resp. to SSUMF ¶ 35; *see also* Behan Decl. ¶ 4); *Barnes-Wallace*, 275 F. Supp.  
18 2d at 1275. The lease was made available to the BSA-DPC without inviting bids from any other  
19 organizations. (Behan Decl. ¶ 4.) Although several local youth-oriented organizations  
20 supported the City's lease to the BSA-DPC and appear to have been involved with obtaining  
21 approval for construction of a youth aquatic center, this is insufficient to demonstrate neutrality  
22 in the lease of the property itself. The involvement of other entities does nothing to alter the fact  
23 that the City chose to deal only with the BSA-DPC as a potential lessee for the Fiesta Island  
24 property.<sup>4</sup>

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<sup>4</sup> In support of its original motion for summary judgment, the BSA-DPC submitted the  
declaration of Sean Roy, the Camping Director of BSA-DPC since 2001. In his declaration, Mr. Roy  
explained that "[m]any youth organizations expressly encouraged and oversaw development of the San  
Diego Youth Aquatic Center through an Advisory Committee[.]" (Doc. No. 148, Decl. of Sean Roy ¶  
12.) In the July 31, 2003 Order, the Court found such participation insufficient. *See Barnes-Wallace*,

1 In addition, similar to the argument raised in support of its previous summary judgment  
2 motion, the BSA-DPC views the Fiesta Island lease as one lease out of over 100 leases with  
3 nonprofit groups. (BSA-DPC P. & A. at 15.) In its previous order, the Court expressly rejected  
4 this argument as being irrelevant "because there is no evidence that the parkland leases were  
5 negotiated as part of any leasing 'program.'" *Barnes-Wallace*, 275 F. Supp. 2d at 1274. With  
6 respect to the Balboa Park lease, the Court found that it was "not the result of a selection process  
7 by which any other entities had the opportunity to compete with the BSA-DPC, but [was] instead  
8 the result of exclusive negotiations between the City and BSA-DPC." *Id.* Similar to the Balboa  
9 Park lease, the City entered into exclusive negotiations with the BSA-DPC without providing  
10 other organizations an opportunity to lease the same parcel of Mission Bay Park property.

11 The BSA-DPC further argues that the City regularly engages in exclusive negotiations if  
12 it is in the City's best interest to do so. (BSA-DPC P. & A. at 17) (citing *Barnes-Wallace*, 275 F.  
13 Supp. 2d at 1274-75). According to the BSA-DPC, "[a]n interest in getting the City the best deal  
14 is an interest neutral toward religion." (BSA-DPC P. & A. at 17.) Despite the City's alleged  
15 practice of regularly engaging in exclusive negotiations, the City bears the burden of "tak[ing]  
16 affirmative steps to avoid an Establishment Clause violation by making the lease available to the  
17 religious, areligious and irreligious on a neutral basis." *Barnes-Wallace*, 275 F. Supp. 2d at 1275;  
18 *see also Mitchell*, 503 U.S. at 809. With respect to the Fiesta Island lease, the City did not afford  
19 others a real opportunity to compete. Rather, like the Balboa Park lease, "[t]he City handpicked  
20 as the preferred lessee an organization that describes religious belief and practice as fundamental  
21 to the services it provides." *Barnes-Wallace*, 275 F. Supp. 2d at 1276.

22 This Court does not question the benefit provided by the Boy Scouts to the City of San  
23 Diego and the community at large resulting from the Fiesta Island lease. The BSA-DPC  
24 constructed and maintained a youth aquatic center at its own expense on public parkland. In  
25 addition, the parties do not dispute that numerous local youth organizations supported the lease  
26 of the Mission Bay Park property to the BSA-DPC. Nevertheless, this public support, as well as  
27 the Fiesta Island Youth Facility Committee's assistance in obtaining approval for the  
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275 F. Supp. 2d at 1274.

1 construction of an aquatic center by appearing before various governmental committees, is  
2 insufficient to satisfy the City's burden to implement a neutral leasing process for the Fiesta  
3 Island property. Like the Balboa Park lease, "[a] reasonable observer would most naturally view  
4 the exclusive negotiations and effective preclusion of secular groups as the City's endorsement  
5 of the BSA-DPC because of its inherently religious program and practices." *Id.* at 1276.  
6 Accordingly, the Court finds that the Fiesta Island lease violates the federal Establishment  
7 Clause. Plaintiffs' cross-motion for summary judgment on this claim is therefore **GRANTED**.  
8

### 9 **III. California Constitution's Religion Clauses**

#### 10 **A. The No Preference Clause**

11 The state constitution guarantees the "[f]ree exercise and enjoyment of religion without  
12 discrimination or preference" and prohibits the state legislature from making a "law respecting  
13 an establishment of religion." Cal. Const. art. I, § 4. California courts have repeatedly indicated  
14 that the state's establishment clause is broader than the federal establishment clause due to its  
15 "no preference" clause. *East Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1139  
16 (Cal. 2000). That clause is satisfied when the government action in question does not endorse  
17 the religious views and beliefs of a particular religion or give "favored status to religion in  
18 general." *Christian Science Reading Room Jointly Maintained v. City and County of San*  
19 *Francisco*, 784 F.2d 1010, 1014 (9th Cir. 1986). Even an appearance of preference is prohibited  
20 and whether the government's action has a secular purpose is irrelevant. *Hewitt v. Joyner*, 940  
21 F.2d 1561, 1567, 1569 (9th Cir. 1991). Public entities are subjected to a "demanding standard of  
22 constitutional compliance." *Murphy v. Bilbray*, 782 F. Supp. 1420, 1429 (S.D. Cal.) (Thompson,  
23 J.), *aff'd sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

24 Similar to the Balboa Park lease, *Woodland Hills Homeowners Organization v. Los*  
25 *Angeles Community College District*, 266 Cal. Rptr. 767 (1990) provides guidance for the Court.  
26 There, a homeowners organization challenged a community college district's long term lease of  
27 property to a religious congregation, claiming that the lease violated the No Preference and No  
28 Aid Clauses. *Woodland Hills*, 266 Cal. Rptr. at 771. The Court of Appeal held that the lease did  
not violate the state constitution because the record was devoid of evidence that the lease

1 advanced or aided Judaism or religion generally, and “[t]he District never took a stance, publicly  
2 or privately, favoring the Congregation over other religious groups or favoring the letting of the  
3 parcel only to a religious group.” *Id.* at 775 (emphasis in original).

4 The process by which the District offered the parcel for lease was public and inclusive so  
5 that its outcome was devoid of even an appearance that the District favored the congregation  
6 throughout the process. The District’s board of trustees initially sought to offer the surplus land  
7 for sale to raise finances. However, unable to sell the property, it decided to lease its surplus  
8 property. *Id.* at 769. The Board voted to adopt a resolution that the land was offered on a long-  
9 term lease not to exceed 75 years and for specified uses for a minimum of three million dollars.  
10 *Id.* Notice that the land was available to lease was (1) posted at City Hall, the county  
11 administration building and the county courthouse; (2) published in a local Daily Journal for  
12 three non-consecutive days; (3) mailed to about 275 people on the District’s real property  
13 mailing list; and (4) reported about in newspapers, including on the front page of the City’s  
14 newspaper and in the plaintiff’s own newsletter. *Id.* The District mailed bid packages at the  
15 request of 41 interested bidders and held a written bid opening and an opportunity for oral  
16 bidding. *Id.* at 769-70. The only bid received by the District was from the congregation. *Id.* at  
17 770. After reviewing and approving the congregation’s bid, the District and the congregation  
18 entered a 75-year lease for three million and twenty-five thousand dollars. *Id.*

19 Similar to the Balboa Park lease, the Fiesta Island lease was the result of exclusive  
20 negotiations with the BSA-DPC and was entered into without the implementation of the City’s  
21 own process by which City property is leased.<sup>5</sup> Although several local youth-oriented  
22 organizations supported the lease of the Fiesta Island property to the BSA-DPC, like the Balboa  
23 Park lease, the City failed to make it publicly known that such property was available for lease  
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26 <sup>5</sup> In the previous order, the Court did not address whether compliance with the City’s leasing  
27 process would have satisfied the City’s obligations under the federal and state constitutions. *Barnes-*  
28 *Wallace*, 275 F. Supp. 2d at 1281 n.5. Once again, the Court makes no determination as to whether  
adherence to the City’s method by which property is leased would violate the federal and state  
constitutions.

1 and invite bids from other potential lessees. By failing to do so, "the City effectively precluded  
2 any competing offers." *Barnes-Wallace*, 275 F. Supp. 2d at 1278.

3 With respect to the Fiesta Island lease, benefits bestowed to the BSA-DPC, an admittedly  
4 religious, albeit nonsectarian, and discriminatory organization, include (1) valuable waterfront  
5 parkland at no charge despite the City's written policy against leasing Mission Bay Park areas to  
6 discriminatory organizations, (SSUMF ¶ 40-42, 49), (2) the accommodation that the City will  
7 not apply the leases' nondiscrimination clauses to the organization's membership, (Resp. to  
8 SSUMF ¶ 49), and (3) the ability to receive fees from non-Boy Scout users, which are deposited  
9 in the BSA-DPC's general account. (*Id.* ¶¶ 46, 68, 69.) The City selected the BSA-DPC to  
10 receive the benefit of the lease without inviting bids from any other organizations. Similar to the  
11 Balboa Park lease, "[t]his preferential treatment has at least the appearance, if not the actual  
12 effect, of government advancement of religion generally and government endorsement of an  
13 organization whose religiosity is fundamental to its provision of youth services in violation of  
14 the state constitution's No Preference Clause." *Barnes-Wallace*, 275 F. Supp. 2d at 1278.  
15 Accordingly, the Court GRANTS Plaintiffs' cross-motion for summary judgment on their claim  
16 that the Fiesta Island lease violates the state constitution's No Preference Clause.

#### 17 B. The No Aid Clause

18 The state constitution also provides in relevant part that no city "shall ever make an  
19 appropriation, or pay from any public fund whatever, or grant anything [] to or in aid of any  
20 religious sect, church, creed, or sectarian purpose[.]" Cal. Const. art XVI, § 5. The clause "bans  
21 any official involvement, whatever its form, which has the direct, immediate, and substantial  
22 effect of promoting religious purposes." *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th  
23 Cir. 2002) (en banc); see also *Christian Science Reading Room*, 784 F.2d at 1016; *California*  
24 *Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974). It is "intended by its framers 'to  
25 guarantee that the power, authority, and financial resources of the government shall never be  
26 devoted to the advancement or support of religious or sectarian purposes.'" *Priest*, 526 P.2d at  
27 520; see also *Paulson*, 294 F.3d at 1130.

28 In the July 31, 2003 Order, the Court concluded that the leases constituted aid to a  
religious purpose. *Barnes-Wallace*, 275 F. Supp. 2d at 1279-80 ("That the BSA-DPC is a

1 religious organization that promotes religious belief and religious practices in general is  
2 undisputed and amply supported by the record. That it is a non-sectarian organization and  
3 whether it conducts religious activities in accordance with one particular faith is immaterial.”).  
4 The remaining issue before the Court with respect to the Fiesta Island lease is whether the  
5 benefit is “indirect, remote or incidental,” as such a benefit does not violate the No Aid Clause.  
6 *Paulson*, 294 F.3d at 1131. The benefit “may qualify as ‘incidental’ if the benefit is available on  
7 an equal basis to those with sectarian and those with secular objectives.” *Id.*

8 As discussed above, the California Court of Appeal found in *Woodland Hills* that the  
9 neutral process by which the Community College District leased the land to the congregation  
10 safeguarded it from any appearance that it had favored Judaism or religion generally. For that  
11 reason, the lease did not violate the No Preference or No Aid Clauses of the state constitution.  
12 Similarly, in *Christian Science Reading Room*, the Ninth Circuit held that the Airport’s rental of  
13 commercial space in its terminal to the Reading Room was an arm’s length transaction and that  
14 the policy by which it rented space to various entities “did not favor or prefer any individual  
15 religion, or religion as a whole.” 784 F.2d at 1015-16. As a result, the benefit to the Reading  
16 Room was indirect and incidental to the lease itself. *Id.* at 1016. Like the Balboa Park lease,  
17 rather than provide a meaningful opportunity for other groups to lease the Fiesta Island property,  
18 the City selected the BSA-DPC for favored status. *Barnes-Wallace*, 275 F. Supp. 2d at 1280.  
19 Accordingly, the Court concludes that the aid enjoyed by the BSA-DPC as a result of the Fiesta  
20 Island lease may not be characterized as “indirect, remote or incidental.” Plaintiffs’ claim for  
21 violation of the state constitution’s No Aid Clause with respect to the Fiesta Island lease is  
22 **GRANTED.**

#### 23 24 **IV. The BSA-DPC’s First Amendment Defense**

25 The BSA-DPC raises the same defense that was asserted in connection with the previous  
26 cross-motions for summary judgment. According to the BSA-DPC, rescission of the Fiesta  
27 Island lease constitutes viewpoint discrimination. (BSA-DPC P. & A. at 21-25; BSA-DPC  
28 Opp’n at 20-22.) This argument was expressly rejected in the July 31, 2003 Order. *See Barnes-*  
*Wallace*, 275 F. Supp. 2d at 1287-88. There, the Court recognized that the BSA-DPC’s right to

1 hold and express its private views is not in issue in this litigation. *Id.* at 1287. Despite the BSA-  
2 DPC's contention, the Court concluded that "the BSA-DPC's status as an expressive  
3 organization does not entitle it to governmental aid, especially on terms more favorable than  
4 [that received] by other, nondiscriminatory, organizations." *Id.*; see also *Boy Scouts of Am. v.*  
5 *Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, — S.Ct. —, 2004 WL 414035 (March 8, 2004)  
6 (holding that the state's decision to bar the Boy Scouts from a state workplace charitable  
7 campaign because it is a discriminatory organization did not violate the organization's First  
8 Amendment rights as an expressive association). Because the Court finds no First Amendment  
9 violation, the BSA-DPC's equal protection defense likewise fails. See *Locke v. Davey*, 124 S.Ct.  
10 1307, 1313 n.3 (2004) (upholding the State of Washington's decision not to provide post-  
11 secondary educational grants to students pursuing a degree in devotional theology).

#### 13 V. Federal and California Equal Protection Clauses

14 The Equal Protection Clause of the federal constitution's Fourteenth Amendment  
15 "commands that no State shall deny to any person . . . the equal protection of the laws, which is  
16 essentially a direction that all persons similarly situated should be treated alike."<sup>6</sup> *City of*  
17 *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Its purpose is to ensure that  
18 the state does not intentionally and arbitrarily discriminate against individuals. *Personnel*  
19 *Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

20 In connection with the motion for final judgment under Fed. R. Civ. P. 54(b), the BSA-  
21 DPC contends that this Court need not determine whether the leases are unconstitutional under  
22 another theory. (BSA-DPC's Mem. of P. & A. in Opp'n to Mot. for Final J. at 3.) Although the  
23 BSA-DPC provides no authority for this assertion, it likely stems from the general maxim that  
24 "courts are not to decide questions of a constitutional nature unless absolutely necessary to a

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26 <sup>6</sup> As noted in the Court's July 31, 2003 Order, the same analysis applies to claims brought under  
27 California's Equal Protection Clause, Cal. Const., art. I, § 7, as under the federal constitution's clause.  
28 *Barnes-Wallace*, 275 F. Supp. 2d at 1280 n.4 (citing *Bd. of Supervisors v. Local Agency Formation*  
*Comm'n*, 838 P.2d 1198, 1204-11 (Cal. 1992); *Griffiths v. Superior Court*, 117 Cal. Rptr. 2d 445, 458  
(Ct. App. 2002)).

1 decision of the case.” *U.S. v. Kaluna*, 192 F.3d 1188, 1197 (9th Cir. 1999) (internal quotation  
2 marks omitted). “Prior to reaching any constitutional questions, federal courts must consider  
3 nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint.” *Id.*  
4 (internal quotation marks omitted).

5 Plaintiffs disagree with the BSA-DPC’s position that this Court need not address the  
6 equal protection claims. First, Plaintiffs point to the fact that the Court preserved the equal  
7 protection claims for trial, instead of dismissing them. *See Barnes-Wallace*, 275 F. Supp. 2d at  
8 1280-85. Although the Court did indeed attempt to resolve the equal protection claims in the  
9 July 31, 2003 Order, the decision to adjudicate these claims stemmed from its inability to resolve  
10 the Establishment Clause and No Aid and No Preference Clause claims concerning the Fiesta  
11 Island lease. Because the Court is now able to make a determination on the Fiesta Island  
12 religion claims, it is unnecessary to determine whether the leases are also unconstitutional under  
13 another theory.

14 Secondly, Plaintiffs rely on two Supreme Court cases in support of their position that this  
15 Court must decide the equal protection claims. (Pls.’ Reply Mem. of P. & A. in Supp. of Mot.  
16 for Final J. at 2-3.) *See Soldal v. Cook County, Illinois*, 506 U.S. 56, 70 (1992); *United States v.*  
17 *James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). In *Soldal*, the plaintiff filed a §  
18 1983 action alleging a violation of the Fourth and Fourteenth Amendments in connection with  
19 the unauthorized eviction of the plaintiff’s trailer from a mobile home park. 506 U.S. at 59. In  
20 concluding that the carrying away of the mobile home constituted an unreasonable seizure in  
21 violation of the Fourth Amendment, the Court noted that “[c]ertain wrongs affect more than a  
22 single right and, accordingly, can implicate more than one of the Constitution’s commands.” *Id.*  
23 at 70. “Where such multiple violations are alleged, we are not in the habit of identifying as a  
24 preliminary matter the claim’s ‘dominant’ character. Rather, we examine each constitutional  
25 provision in turn.” *Id.* As further explained in *Good*, a case addressing “whether, in the absence  
26 of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the  
27 Government in a civil forfeiture case from seizing real property without first affording the owner  
28 notice and an opportunity to be heard[.]” 510 U.S. at 46, the Court ruled that “the seizure of  
property implicates two explicit textual source[s] of constitutional protection, the Fourth

1 Amendment and the Fifth.” *Id.* at 50 (internal quotation marks omitted). Thus, “[t]he proper  
2 question is not which Amendment controls but whether either Amendment is violated.” *Id.*  
3 Presuming that the seizure did not violate the Fourth Amendment, the Court analyzed the seizure  
4 under the Due Process Clause. *Id.* at 52.

5 Despite Plaintiffs’ reliance on *Soldal* and *Good*, these cases simply stand for the  
6 proposition that courts must address each constitutional claim instead of focusing on the  
7 “dominant” claim. Although state action may trigger rights under multiple constitutional  
8 provisions, the Court cannot choose to address only a single constitutional challenge. Had the  
9 Court concluded that the Camp Balboa lease did not violate the Establishment Clause, as well as  
10 the state constitutional religion clauses, then this Supreme Court precedent mandates review of  
11 the remaining constitutional challenges. *See Sanders v. City of San Diego*, 93 F.3d 1423, 1427-  
12 28 (9th Cir. 1996) (addressing the plaintiff’s due process claim only after rejecting the plaintiff’s  
13 Fourth Amendment challenge). However, because the Court has already determined that  
14 Plaintiffs’ constitutional rights have been violated under the Establishment Clause, the Court  
15 need not address the remaining challenge under the Equal Protection Clause. *See, e.g., Guam*  
16 *Soc’y of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1374 n.10 (9th Cir. 1992)  
17 (finding it unnecessary to address the plaintiffs’ remaining constitutional challenges to a Guam  
18 anti-abortion statute where summary judgment was granted in favor of the plaintiffs on their  
19 substantive due process claim). This position furthers the general policy disfavoring needless  
20 resolution of constitutional questions. Accordingly, in the exercise of judicial restraint, the  
21 Court declines to rule on the equal protection claims. Plaintiffs’ claims that their equal  
22 protection rights have been violated under the federal and state constitutions are therefore  
23 **DISMISSED**, as they are moot.

#### 24 25 **VI. Motion for Entry of Final Judgment Under Rule 54(b)**

26 On January 8, 2004, Plaintiffs and the City entered into a settlement agreement with  
27 respect to both the Balboa Park and Fiesta Island leases. (*See Decl. of Andrew Woodmance in*  
28 *Supp. of Mot. for Final J., Ex. B (“Settlement Agreement”).*) Pursuant to the Agreement,  
Plaintiffs and the City seek entry of final judgment under Rule 54(b) to “void and enjoin the

1 current Camp Balboa lease." (Settlement Agreement at 4.) Moreover, the Agreement provides  
2 that the City is under no obligation to commence proceedings to evict or eject the BSA-DPC  
3 until all appeals involving both leases have been resolved in Plaintiffs' favor. (*Id.* at 3, 5.)  
4 Furthermore, the City agreed not to take a position on Plaintiffs' claims challenging the validity  
5 of the Fiesta Island lease. (*Id.* at 5.)

6 Rule 54(b) provides in relevant part:

7 When more than one claim for relief is presented in an action, . . . the court may direct the  
8 entry of a final judgment as to one or more but fewer than all of the claims . . . only upon  
9 an express determination that there is no just reason for delay and upon an express  
direction for the entry of judgment.

10 Fed. R. Civ. P. 54(b). Because the Court has now adjudicated all claims relating to both leases  
11 that mandate resolution, entry of final judgment under Rule 54(b) is not proper. Rather, the  
12 Clerk's office is directed to enter final judgment as to the entire action pursuant to Rule 58. *See*  
13 Fed. R. Civ. P. 58; *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987). Accordingly, the  
14 motion for entry of final judgment under Rule 54(b) is **DENIED** as moot.

15  
16 **VII. Plaintiffs' *Ex Parte* Application to Strike Declarations Submitted by the BSA-DPC**  
17 **in Reply to Its Further Motion for Summary Judgment**

18 Also before the Court is Plaintiffs' *ex parte* application to strike the declarations of Scott  
19 H. Christensen and A.E. Pellerin submitted by the BSA-DPC with its reply brief in support of its  
20 cross-motion for summary judgment. [Doc. No. 294.] Plaintiffs contend that the Court should  
21 not consider evidence submitted in connection with a reply brief to a motion for summary  
22 judgment. (*Ex Parte* Application at 1.) Because the Court has not relied on these declarations in  
23 its discussion herein, Plaintiffs' *ex parte* application is **DENIED** as moot.

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**Conclusion**

Having read the parties' briefs, supporting documents and evidence, and the applicable law, and given full consideration to the arguments made by all parties and admissible evidence in support thereof, **IT IS HEREBY ORDERED** that:

- (1) Plaintiffs' cross-motion for summary judgment on their claims that the Fiesta Island lease violates the Establishment Clause of the federal constitution and the No Aid and No Preference Clauses of the state constitution is **GRANTED**;
- (2) The cross-motions for summary judgment on Plaintiffs' claims that the Fiesta Island lease violates their equal protection rights under the federal and state constitutions are **DENIED** as moot;
- (3) Plaintiffs' claims that the Fiesta Island lease violates their equal protection rights under the federal and state constitutions are **DISMISSED** as moot;
- (4) Plaintiffs' motion for entry of final judgment under Rule 54(b) is **DENIED**, as the Clerk's office is directed to enter judgment with respect to the entire action under Rule 58; and
- (5) All evidentiary objections are **OVERRULED** and motions to strike **DENIED** as moot.

Dated: April 9, 2004

  
NAROLEON A. JONES, JR.  
United States District Judge

cc: Magistrate Judge Battaglia  
All Counsel of Record