

No. 05-3451

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, et al.
Plaintiffs-Appellees,

vs.

DONALD H. RUMSFELD, SECRETARY OF THE DEPARTMENT OF
DEFENSE
Defendant-Appellant.

Appeal From the United States District Court
for the Northern District of Illinois
No. 1999-CV-02424; The Honorable Blanche M. Manning

AMICI CURIAE BRIEF OF THE UNITARIAN UNIVERSALIST
ASSOCIATION OF CONGREGATIONS, *ET AL.* – SUPPORTING
PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

ERIC ALAN ISAACSON (120584)
(Counsel of Record)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

REV. SILVIO NARDONI (48395)
535 North Brand Blvd., Suite 501
Glendale, CA 91203
Telephone: 818/550-1800
818/550-1850 (fax)
SUSAN KAY WEAVER (137601)
P.O. Box 669
El Cajon, CA 92020
Telephone: 619/368-4562
619/749-1304 (fax)

Counsel for *Amici Curiae*: The Unitarian Universalist Association of
Congregations; Elliott Welsh; the Social Justice Committee of the Unitarian
Universalist Society of Geneva, Illinois, and its ministers, the Rev. Dr. Lindsay
Bates and the Rev. Jennifer Innis; the First Unitarian Church of Cincinnati and its
minister, the Rev. Sharon Dittmar; the Social Justice Ministries of All Souls
Church, Unitarian, and its Director of Social Justice Ministries, the Rev. Louise
Green; the Board of Trustees of the Unity Temple Unitarian Universalist
Congregation and its minister, the Rev. Alan C. Taylor; the Social Justice
Committee and Board of Trustees of the First Unitarian Universalist Church of San
Diego, its ministers, the Rev. Dr. Arvid Straube and the Rev. Julie Kain, and its
Director of Religious Education, Elizabeth Motander Jones; and the Unitarian
Universalist Legislative Ministry California

**SEVENTH CIRCUIT RULE 26.1 AND FRAP 26.1 ATTORNEY AND
CORPORATE DISCLOSURE STATEMENTS**

Seventh Circuit Rule 26.1 Attorney Disclosures

The lawyers appearing on behalf of Unitarian Universalist *amici curiae* in this case are: Eric Alan Isaacson, the Rev. Silvio Nardoni, and Susan Kay Weaver. Each is working on a *pro bono* basis, motivated by moral concern and religious conviction, with no expectation of financial gain to themselves or their firms.

Rule 3(d) Counsel of Record, Eric Alan Isaacson, is a partner in the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP. A former Boy Scout himself, Mr. Isaacson currently serves as President of the Board of Directors of the San Diego Foundation for Change. He is a member of the First Unitarian Universalist Church of San Diego,¹ where he and his wife Susan Kay Weaver teach Sunday school.

The Rev. Silvio Nardoni is a principal in the Law Office of Silvio Nardoni. Rev. Nardoni is Affiliate Minister of the Unitarian Universalist Community Church of Santa Monica, California,² and a member of the Board of Trustees of the Unitarian

¹ <http://www.firstuusandiego.org/>

² <http://www.uusm.org/>

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Universalist Legislative Ministry California,³ which he currently serves as Board Secretary.⁴

Susan Kay Weaver is a principal in the Law Office of Susan Kay Weaver. Ms. Weaver is a member of the First Unitarian Universalist Church of San Diego, where she and her husband Eric Alan Isaacson teach Sunday School. Although their own son would like to participate in Scouting, as his father once did, the boy finds himself excluded by the Boy Scouts of America's current policies.

Isaacson, Nardoni, and Weaver together represent the following Unitarian Universalist *amici* before this Court: The Unitarian Universalist Association of Congregations; Elliott Welsh; the Social Justice Committee of the Unitarian Universalist Society of Geneva, Illinois, and its ministers, the Rev. Dr. Lindsay Bates and the Rev. Jennifer Innis; the First Unitarian Church of Cincinnati and its minister, the Rev. Sharon Dittmar; the Social Justice Ministries of All Souls Church, Unitarian, and its Director of Social Justice Ministries, the Rev. Louise Green; the Board of Trustees of the Unity Temple Unitarian Universalist Congregation and its minister, the

³ <http://www.uulmca.org/>

⁴ <http://www.uulmca.org/about/board.html>

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Rev. Alan C. Taylor; the Social Justice Committee and Board of Trustees of the First Unitarian Universalist Church of San Diego, its ministers, the Rev. Dr. Arvid Straube and the Rev. Julie Kain, and its Director of Religious Education, Elizabeth Motander Jones; and the Unitarian Universalist Legislative Ministry California.

FRAP 26.1 Corporate Disclosure Statement

The Unitarian Universalist Association of Congregations⁵ is a nonprofit religious denomination comprising more than 1,000 Unitarian Universalist congregations, including churches and fellowships. It has no parent corporation, and issues no stock.

Neither the Unitarian Universalist Society of Geneva, Illinois,⁶ a member of the Unitarian Universalist Association of Congregations tracing its history to the First Christian Congregation (Unitarian) in Geneva, organized there in 1842, nor its Social Justice Committee, issues any stock.

⁵ <http://www.uua.org/>

⁶ <http://www.uusg.org/>

The First Unitarian Church of Cincinnati,⁷ a member of the Unitarian Universalist Association of Congregations that first gathered in 1830 and that was the home church of President and Chief Justice William Howard Taft, issues no stock.

Neither the Social Justice Ministries of All Souls Church, Unitarian, of Washington D.C.,⁸ nor the Church itself – a member of the Unitarian Universalist Association of Congregations that was organized in 1821 by John Quincy Adams and his associates in faith as the First Unitarian Church of Washington, which was President and Chief Justice William Howard Taft’s place of worship for some 24 years during his service in the United States Capitol, and which the Rev. James Reeb served as Assistant Minister until shortly before his death in Selma, Alabama in 1965 – issues any stock.

Neither the Unity Temple Unitarian Universalist Congregation,⁹ a member of the Unitarian Universalist Association of Congregations tracing its history to Unity Church, organized at Oak Park in 1871, nor its Board of Trustees, issues any stock.

⁷ <http://www.firstuu.com/>

⁸ <http://www.all-souls.org/>

⁹ <http://www.unitytemple.org/>

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Neither the First Unitarian Universalist Church of San Diego,¹⁰ a member of the Unitarian Universalist Association of Congregations that first gathered in the 1870s, nor its Social Justice Committee or Board of Trustees, issues any stock.

The Unitarian Universalist Legislative Ministry California¹¹ is a nonprofit social-justice ministry that has no parent corporation and issues no stock.

None of the foregoing *amici* is controlled by any publicly traded corporation.

¹⁰ <http://firstuusandiego.org/>

¹¹ <http://www.uulmca.org>

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QUESTION PRESENTED

May the federal government sponsor a youth festival that imposes a religious test as a precondition to participation, openly and notoriously discriminating on the basis of personal religious beliefs and denominational affiliations, and excluding many on the ground that their beliefs make them social inferiors – not “the best kind of citizen”?

I. INTRODUCTION

That Unitarian Universalists should have to file this brief is sadly ironic.

In 1910, the BSA’s organizers asked William Howard Taft, the President of the United States and a leading Unitarian, to be honorary president of their new organization for youth.¹ Taft not only agreed, he ensured the group’s success: “The national character of the Boy Scouts of America was strikingly brought before the people of the country, in the very beginning, by holding the first annual meeting in the White House, on February 14 and 15, 1911, at the invitation of President Taft, honorary president of the Boy Scouts of America.”²

¹ William D. Murray, *The History of The Boy Scouts of America* 34, 38 (New York: BSA, 1937).

² *Id.*, at 37-38, 309.

Taft subsequently served both as the BSA's honorary vice president from 1913 to 1930,³ and as president of the General Conference of Unitarian and other Christian Churches from 1915 to 1925, when it was absorbed by the American Unitarian Association – which itself would merge in 1961 with the Universalist Church in America to become the Unitarian Universalist Association of Congregations or “UUA.”⁴ Taft's service as his religious denomination's chief executive, and as the BSA's honorary vice president, overlapped with service as Chief Justice of the United States, from 1921 to his death in 1930.⁵

The great President and Chief Justice would be surprised to learn that, just a few decades later, the youth organization that he launched has turned upon his own denomination. For in 1992 the BSA banned his denomination from its Religious Relationships Committee. And in 1998 the BSA expelled Taft's denomination from its Religious Awards Program. The denomination's offense: teaching its children that institutionalized discrimination is wrong.

³ *Id.*, at 545-46.

⁴ Mark W. Harris, *Historical Dictionary of Unitarian Universalism* 459 (Lanham, Maryland: Scarecrow Press, 2004); Vernon B. Hampton, *Religious Background of the White House* 262-63, 340 (Boston: Christopher Publ., 1932).

⁵ Harris, *Historical Dictionary* at 459.

Secretary Rumsfeld insists that the BSA is “nonsectarian,” that it “welcomes young people of every religious denomination,” and that it has no theology. In truth, the BSA has come under the control of religious zealots – expelling children and adult leaders for theological differences. They condemn homosexuals as an *unclean* people who, along with atheists and agnostics, must be shunned. When the UUA, whose member churches sponsored dozens of Boy Scout troops, objected that people should not be shunned because of their personal religious beliefs or sexual orientation, the BSA responded first by denying Unitarian Universalists a place on the BSA’s Religious Relationships Committee, and then by revoking BSA approval for the denomination’s religious-emblem awards – denying Unitarian Universalist youth an opportunity to participate in Scouting on an equal footing with other denominations.

The facts are not in dispute. Eagle Scout and Professor of American Studies Jay Mechling writes that the BSA openly and deliberately “punished the Unitarian Universalist Church and its Scout members.”⁶ The *Chicago Tribune* reported that “the loyal, friendly and cheerful Boy Scouts effectively excommunicated the Unitarians.”⁷

⁶ Jay Mechling, *On My Honor: Boy Scouts and the Making of American Youth* 211 (Chicago: University of Chicago Press, 2001); see also Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 *Law & Sexuality* 271, 317 (2003).

⁷ Addendum A18, Steve Kloehn, *Boy Scouts, Unitarians Reach Parting of the Ways*, *Chicago Tribune*, July 24, 1998 (“In recent years, the Unitarian Universalist

The denomination called upon Unitarian Universalists to join Scouting and work for change from within, A54, but the BSA added a new requirement to its membership applications, requiring subscription now to a “Declaration of Religious Principle” denigrating nontheists as second-class citizens – pronouncing “that no member can grow into the best kind of citizen without recognizing an obligation to God,” and that only those who agree “shall be entitled to certificates of membership.”⁸

What this means is clear enough. To be a Boy Scout or Cub Scout now requires agreeing that anyone who does not share the BSA leadership’s faith in God must be shunned as not “the best kind of citizen.” A 2003 Harris Poll reports that most American Jews, for example, cannot provide the confession of faith required by the BSA to qualify as “the best kind of citizen” and participate in Scouting.⁹ Many

Association, which prides itself on being open-minded, has been sharply critical of the Boy Scouts. In response, the loyal, friendly and cheerful Boy Scouts effectively excommunicated the Unitarians this summer, declaring the church could no longer sponsor the Boy Scout ‘Religion in Life’ badge, and that Boy Scouts could no longer wear the Unitarian Universalist emblem on their uniforms.”); see A24, Gustav Niebuhr, *Unitarians are Disputing Boy Scouts on Emblems*, The New York Times, Aug. 1, 1998 (“Until now, the Boy Scouts have never forbidden a religious body from awarding such emblems to its youths, a Scout spokesperson said.”).

⁸ A1-A9 (new membership forms). See *infra* 18-24.

⁹ The Harris Poll found that only 48% of American Jews could affirm a belief in God. Most could not – 19% were either “somewhat certain” or “absolutely certain that there is no God,” while 33% were simply “not sure whether or not there is a

Unitarian Universalists are similarly excluded from Scouting, as social inferiors – not “the best kind of citizen” – along with humanists, atheists, and agnostics of every stripe.

Secretary Rumsfeld concedes that the BSA does this because it “considers reverence to be an aspect of good citizenship.” AOB 55-56. By sponsoring the BSA Jamboree, the federal government thus joins it in sending a clear message to nonadherents, including nontheists, homosexuals, mainstream Unitarian Universalists, and most American Jews, “that they are outsiders, not full members of the political community.” *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (Blackmun, J., quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)); *see id.*, 492 U.S. at 625-27 (O’Connor, J., concurring).

The BSA is legally entitled to send such a message: “Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.” *BSA v. Dale*, 530 U.S. 640, 651 (2000) (quoting *Thomas v. Review Board*, 450 U.S. 707, 714 (1981)). But the federal government cannot, consistent with our Constitution’s religion clauses, involve itself in or otherwise

God.” Humphrey Taylor, *The Harris Poll #59* (October 15, 2003), http://www.harrisinteractive.com/harris_poll/index.asp?PID=408.

appear to endorse the BSA's program and message. It cannot sponsor the BSA Jamboree.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

A. The *Amici*

This brief is filed by the **Unitarian Universalist Association of Congregations** or "**UUA**," a religious denomination comprising more than a thousand congregations – starting with the one that the Mayflower Pilgrims brought to Plymouth, Massachusetts in 1620 – and by **Elliott Welsh**, an Illinois Unitarian Universalist whose family has been the target of the BSA's religious-viewpoint discrimination.

When Welsh's son was in first grade, his public-school teacher handed the boy a flyer for the BSA's Tiger Cub program. But when his family sought to participate in Scouting, the BSA excluded them on religious grounds.¹⁰ Indeed, Secretary Rumsfeld now cites the Welshes' case to exemplify how the BSA presents its values to American youth. *See* AOB 3 (quoting *Welsh v. BSA*, 993 F.2d 1267, 1278 (7th Cir. 1993)).

¹⁰ *See Welsh v. BSA*, 742 F. Supp. 1413 (N.D. Ill. 1990) (denying motion to dismiss); *Welsh v. BSA*, 787 F. Supp. 1511 (N.D. Ill. 1992) (granting summary judgment), *aff'd*, 993 F.2d 1267 (7th Cir. 1993).

Active in Unitarian Universalist congregations for decades, Welsh currently is a member of the **Unitarian Universalist Society of Geneva, Illinois**, which first gathered in 1842.¹¹ The **Geneva Society's Social Justice Committee**, its Senior Minister, the **Rev. Dr. Lindsay Bates**, and Interim Associate Minister, the **Rev. Jennifer Innis**, join Welsh and the UUA in filing this brief. So do:

- The **First Unitarian Church of Cincinnati**,¹² a congregation that first gathered in 1830, and that was President William Howard Taft's home church, along with its current minister, the **Rev. Sharon Dittmar**.
- The **Social Justice Ministries of All Souls Church Unitarian, Washington, D.C.**¹³ – which traces its history to the First Unitarian Church of Washington, organized by John Quincy Adams in 1821, and which was President and Chief Justice William Howard Taft's place of worship during twenty-four years of service in the United States Capitol – and its Director of Social Justice Ministries, the **Rev. Louise Green**.
- The **Rev. Alan C. Taylor** and the **Board of Trustees of Unity Temple Unitarian Universalist Congregation**, which traces its history to Unity Church, gathered at Oak Park in 1871 (worshiping today in a building designed by congregation-member Frank Lloyd Wright).¹⁴
- The **First Unitarian Universalist Church of San Diego**, which first gathered in the 1870s.¹⁵ Its **Board of Trustees** and ministers, the **Rev. Dr. Arvid**

¹¹ <http://www.uusg.org/>

¹² <http://firstuu.com/>

¹³ <http://www.all-souls.org/>

¹⁴ <http://www.unitytemple.org>

¹⁵ <http://www.firstuusandiego.org/>

Straube and the **Rev. Julie Kain**, Director of Religious Education, **Elizabeth Motander Jones**, and **Social Justice Committee**, joined the **Unitarian Universalist Legislative Ministry California**, in filing an *amicus curiae* brief in the Ninth Circuit opposing government sponsorship of the BSA's discriminatory policies in Southern California.¹⁶ The United States appeared there as *amicus curiae*, supporting the BSA's religious-viewpoint discrimination – citing “the special relationship between the United States and the Boy Scouts,” *as evidenced by this case*, to demonstrate its interest.¹⁷

B. Unitarian Universalist Identity

Comprising more than 1,000 congregations and fellowships, the UUA was formed in 1961 by the union of the American Unitarian Association and the Universalist Church of America – two denominations that, despite the BSA's claim to speak for “traditional values,” have shaped the development and moral conscience of the American nation.

American Unitarianism grew from New England's first Protestant congregations, founded by the Pilgrims and Puritans in the 1600s, as they shed Calvinist dogmas for a noncreedal liberal faith.¹⁸ By the early 1800s, Massachusetts'

¹⁶ See Brief of *Amici Curiae* Social Justice Committee and Board of Trustees of the First Unitarian Universalist Church of San Diego, et al., *Barnes-Wallace v. City of San Diego*, 9th Cir. Nos. 04-55732 and 04-56167 (April 5, 2005); see http://firstuusandiego.org/coming_events/amicus_brief.pdf.

¹⁷ *Amicus Curiae* Brief of the United States in *Barnes-Wallace* at 2 (Feb. 15, 2005).

¹⁸ See Conrad Wright, *The Beginnings of Unitarianism in America* (Boston: Starr King Press, 1955). “In the course of the controversy, 120 Congregational churches in New England, founded before the War of Revolution, went over to the Unitarians.”

oldest congregations were Unitarian – including the one that the Mayflower Pilgrims brought to Plymouth in 1620, along with the first churches in Salem and Boston.¹⁹ Others joined the Pilgrims’ and Puritans’ original churches. Boston’s King’s Chapel, founded in 1686 as New England’s first Episcopal church, has been Unitarian since the 1780s.²⁰ In 1794, Dr. Joseph Priestley fled English mob violence, to organize

H.K. Carroll, *The Religious Forces of the United States* 366 (New York: Christian Literature Co., 1893). “By 1800, of the 200 churches east of Worcester County, 125 were liberal in their theology[, of] 20 churches in Plymouth County, 18 . . . [a]nd 8 of the 9 churches in Boston” David E. Bumbaugh, *Unitarian Universalism: A Narrative History* 105-06 (Chicago: Meadville-Lombard Press, 2000).

¹⁹ Bumbaugh, *Unitarian Universalism*, at 115. Joseph Henry Allen observed in 1894 that “the First Church in Plymouth (1620), the First Church in Salem (1629), and the First Church in Boston (1630) . . . are all now known as Unitarian, and each exists at this day under its original covenant.” Joseph Henry Allen, *Historical Sketch of the Unitarian Movement Since the Reformation*, in Joseph Henry Allen & Richard Eddy, *A History of the Unitarians and the Universalists in the United States* 170 (New York: Christian Literature Co., 1894). These churches remain active today:

First Parish Church Plymouth: <http://firstparish.plymouth.ma.uua.org/>

First Church Salem: <http://www.firstchurchinsalem.org/>

First and Second Church in Boston: <http://www.fscboston.org/>.

²⁰ See <http://www.kings-chapel.org/>; Bumbaugh, *Unitarian Universalism*, at 95, 102-04; F.W.P. Greenwood, *A History of King’s Chapel in Boston; the First Episcopal Church in New England* 137-43 (Boston: Carter, Hendee & Co., 1833).

Unitarian services in Pennsylvania,²¹ and preach from Elhanan Winchester's Universalist pulpit in Philadelphia²² – where Rev. Winchester had founded the Society of Universal Baptists in 1785.²³

Moved by a gospel of universal love, America's Universalists joined Quakers in leading early religious opposition to slavery. The Universalist General Convention met at Philadelphia in 1790 to condemn involuntary servitude in prose framed by Dr. Benjamin Rush.²⁴ Following the 1843 General Convention's renewed condemnation,

²¹ Bumbaugh, *Unitarian Universalism*, at 95. Founded in 1796, Priestley's First Unitarian Church of Philadelphia remains active. See <http://www.firstuuphilly.org/Index.html>.

²² See, e.g., Joseph Priestley, *Unitarianism Explained and Defended, in a discourse delivered in the Church of the Universalists, at Philadelphia, 1796* (Philadelphia: John Thompson, 1796). The era's leading scientist, Priestley also wrote extensive religious commentaries. See, e.g., Joseph Priestley, *An History of Early Opinions Concerning Jesus Christ, Compiled from Original Writers, Proving that the Christian Church was at First Unitarian* (Birmingham: Pearson & Rollason, 1786).

²³ Bumbaugh, *Unitarian Universalism*, at 151.

²⁴ Ernest Cassara, *Universalism in America: A Documentary History 181-82* (Boston: Beacon Press, 1971) (reprinting 1790 text condemning slavery and as “inconsistent with the union of the human race in a common Saviour, and the obligations to mutual and universal love which flow from that union”); Richard Eddy, *History of Universalism* in Joseph Henry Allen & Richard Eddy, *A History of the Unitarians and the Universalists in the United States* 415-16 (New York: Christian Literature Co., 1894); Russell E. Miller, *The Larger Hope: The First Century of the Universalist Church in America, 1770-1870* 579-80 (Boston: UUA, 1979).

Universalists were recognized for opposing slavery before other denominations.²⁵

When the Fugitive Slave Law took effect in 1850, Universalist state conventions called for civil disobedience.²⁶ More than a few Unitarians joined them.²⁷

Unitarians and Universalists also led the vanguard for women's equality. "Judith Sargent Murray, an advocate of Universalism and women's rights, held a local Universalist preacher's license as early as the 1790s; other Universalist women joined her in the opening decades of the 1800s."²⁸ And Universalists in 1863 became the first national denomination to ordain women – beginning with the Revs. Olympia Brown and Augusta J. Chapin.²⁹ The Universalist Rev. Brown naturally joined

²⁵ Bumbaugh, *Unitarian Universalism*, at 152, 164-165; Miller, *Larger Hope*, at 614-15. By then, Unitarians too had become notorious for antislavery sentiments. See, e.g., William Ellery Channing, *Slavery* (Boston: James Monroe & Co., 1835).

²⁶ Bumbaugh, *Unitarian Universalism*, at 165; Miller, *Larger Hope*, at 622-23.

²⁷ With the Fugitive Slave Law's passage, "Unitarian opposition to slavery was pushed into its most active phase." David Robinson, *The Unitarians and the Universalists* 84 (Westport, Conn.: Greenwood Press, 1985). Boston's Rev. Theodore Parker, for example, was indicted for his abolitionist work. See Henry Steele Commager, *Theodore Parker* 197-247 (Boston: Little, Brown & Co., 1936).

²⁸ Paula D. Nesbitt, *Feminization of the Clergy in America* 36-37 (New York: Oxford Univ. Press, 1997); see also Ann Lee Bressler, *The Universalist Movement in America, 1770-1870* 89 (New York: Oxford Univ. Press, 2001); Miller, *Larger Hope*, at 546-57.

²⁹ Bumbaugh, *Unitarian Universalism*, at 167; see Miller, *Larger Hope*, at 551-54. Chapin "noted in 1874 that Universalists claimed more ordained women than any other branch of the Christian church." Bressler, *Universalist Movement*, at 90.

Unitarians Susan B. Anthony, Elizabeth Cady Stanton, and Lucy Stone, in leading the women's suffrage movement.³⁰ Their coreligionists have fought many other battles for human dignity; the Rev. John Haynes Holmes co-founded the NAACP in 1909,³¹ and Unitarian Universalists stood fast for civil rights in the twentieth century.³²

Following the Unitarian and Universalist denominations' 1961 merger, and reflecting values developed over the preceding centuries, the UUA's General Assembly in the 1980s resolved overwhelmingly:

We, the member congregations of the Unitarian Universalist Association, covenant to affirm and promote

- The inherent worth and dignity of every person;
- Justice, equity and compassion in human relations;
- Acceptance of one another and encouragement to spiritual growth in our congregations;
- A free and responsible search for truth and meaning;

³⁰ Charlotte Coté, *Olympia Brown: The Battle for Equality* (Racine: Mother Courage Press, 1988).

³¹ William G. Sinkford, ed., *The Unitarian Universalist Pocket Guide* 71 (Boston: Skinner House 4th ed. 2004); Carl Hermann Voss, *Rabbi and Minister: The Friendship of Stephen S. Wise and John Haynes Homes* 101-103 (New York: Association Press, 1964); John Haynes Holmes, *I Speak for Myself* 196-208 (New York: Harper & Bros., 1959).

³² See, e.g., Richard D. Leonard, *Call to Selma: Eighteen Days of Witness* viii (Boston: Skinner House, 1993).

- The right of conscience and the use of the democratic process within our congregations and in society at large;
- The goal of world community with peace, liberty, and justice for all;
- Respect for the interdependent web of all existence of which we are a part.

UUA Bylaws & Rules, Art. II, sec. C-2.1.³³

Through the years, the denomination has repeatedly reaffirmed the principle that religious freedom requires governmental neutrality and separation of church and state.³⁴ Since the 1970s, it has vehemently opposed discrimination on account of sexual orientation.³⁵

C. Unitarian Universalists' Experience with Political Disabilities, Discrimination, and Establishments of Religion

The UUA comprises many of America's oldest and most venerated churches. Illinois Governor Adlai Stevenson and four Presidents of the United States were Unitarians.³⁶ So were several Supreme Court Justices – Joseph Story and Oliver

³³ <http://www.uua.org/administration/bylaws.html#sectionC-2.1>; see Bumbaugh, *Unitarian Universalism*, at 196-97.

³⁴ <http://www.uua.org/actions/religious-freedom/>

³⁵ <http://www.uua.org/actions/bglit/>

³⁶ Namely: John Adams (1797-1801), John Quincy Adams (1825-1829), Millard Fillmore (1850-1853), and William Howard Taft (1909-1913). See Bliss Isely, *The Presidents: Men of Faith* 11, 45, 103, 206 (Boston: W.A. Wilde Co., 1954). Although

Wendell Holmes among them.³⁷ Yet Unitarians and Universalists often have suffered at the hands of those who – like the BSA – purport to speak for “traditional values.”

Universalists, in particular, faced extreme legal disabilities – some nineteenth-century courts even refused to let them testify in legal proceedings.³⁸

Taxed to support politically established Calvinist churches – from whose dogmas of human depravity and predestination they recoiled – Universalists struggled for half a century to “disestablish” state-sponsored religion in Massachusetts. When Universalists started their own church at Gloucester, political authorities seized and auctioned off their property.³⁹ The Universalists went to court – eventually

Thomas Jefferson (1801-1809) never actually joined a Unitarian church, he attended Joseph Priestley’s Unitarian services when in Philadelphia, referred to himself as “an Unitarian by myself” at Monticello, and even expressed hope that “Unitarianism would become the general religion of the United States.” Charles B. Sandford, *The Religious Life of Thomas Jefferson* 5-6, 33, 101, 116 (Charlottesville: Univ. Va. Press, 1984).

³⁷ They are: William Cushing (1790-1810), Joseph Story (1812-1845), Nathan Clifford (1858-1881), Samuel F. Miller (1862-1890), Horace Gray (1882-1902), Oliver Wendell Holmes (1902-1932), William Howard Taft (C.J. 1921-1930), Wiley B. Rutledge (1943-1949), Harold H. Burton (1945-1958).

³⁸ See, e.g., *Smith v. Coffin*, 18 Me. 157 (1841); *Atwood v. Welton*, 7 Conn. 66 (1828).

³⁹ Richard Eddy, *Universalism in Gloucester, Mass.* 20-23 (Gloucester: Procter Bros., 1892).

vindicating their right to support their own church and not someone else's.⁴⁰ So political authorities prosecuted their minister – for performing *weddings* – forcing him to flee the country.⁴¹ Massachusetts finally disestablished its churches in 1833.⁴²

State authorities also meddled in Unitarians' affairs, as when New Hampshire's Supreme Court disqualified the Dover, New Hampshire, First Unitarian Society of Christians' chosen minister – as insufficiently “Christian.”⁴³

In the presidential race of 1908, “many good Christians among the voters needed no evidence to convince them that Taft, a Unitarian, was necessarily also an infidel.”⁴⁴ Some denounced the Republican candidate as a “Unitarian atheist.”⁴⁵ *The Nation* noted religious conservatives' “ardent personal appeals, not to let high heaven

⁴⁰ *Id.* at 23-28; Eddy, *History of Universalism*, at 401-403; Miller, *Larger Hope*, at 21-26.

⁴¹ Eddy, *Universalism in Gloucester*, at 28-29; Eddy, *History of Universalism*, at 405; Miller, *Larger Hope*, at 27.

⁴² *See Colo v. Treasures and Receiver General*, 392 N.E. 2d 1195, 1198-99 (Mass. 1979).

⁴³ *Hale v. Everett*, 53 N.H. 9 (1868).

⁴⁴ Henry F. Pringle, *The Life and Times of William Howard Taft* 374 (New York: Farrar & Rinehart, 1939).

⁴⁵ Harris, *Historical Dictionary* at 458; Edmund Fuller & David E. Green, *God in the White House: The Faiths of American Presidents* 169 (New York: Crown Publishers, 1968).

witness the seating in the White House of a man who denies the divine parentage of Jesus.”⁴⁶ ““Think of the United States with a *President* who does not believe that Jesus Christ was the Son of God,’ shuddered the editor of one religious paper, ‘but looks upon our immaculate Savior as a common bastard and low, cunning imposter.’”⁴⁷ Taft faced such hostility, *The Nation* observed, “because he believes in the religion of Emerson, of Channing, of Theodore Parker – in fine, because he is a member of a sect which has supplied leaders for all the great humanitarian movements of the last century.”⁴⁸

In 1958, when Unitarian churches refused loyalty oaths, Justice Douglas observed: “The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs.” *First Unitarian Church of Los Angeles v. Los Angeles*, 357 U.S. 545, 546-47 (1958) (Douglas, J., concurring). That same year Unitarians from Pennsylvania filed suit to stop Biblical readings and prayer in public schools –

⁴⁶ “Taft and his Religion,” 87 *The Nation* 278-79 (Sept. 24, 1908).

⁴⁷ Pringle, *Life of Taft*, at 374 (quoting *Pentecostal Herald* July 15, 1908)).

⁴⁸ “Taft and his Religion,” 87 *The Nation* 279 (Sept. 24, 1908).

eventually terminating “religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.” *School District v. Schempp*, 374 U.S. 203, 225 (1963).

The denomination faced violence in the 1960s. When Unitarian Universalist clergy joined the (Baptist) Rev. Martin Luther King, in Selma, Alabama, in 1965, bigots attacked and murdered the Rev. James Reeb.⁴⁹ When Viola Liuzzo, a Unitarian Universalist lay person from Detroit, traveled to Selma to carry on Reeb’s work for civil rights, she was herself murdered by Klansmen.⁵⁰

Reeb and Liuzzo died in a struggle for human dignity and social equality of despised minorities that continues today, as Unitarian Universalists bear public witness against institutionalized discrimination on the basis of religious viewpoint and sexual orientation – thereby incurring the BSA’s wrath.

⁴⁹ See Duncan Howlett, *No Greater Love: The James Reeb Story* (Boston: Skinner House, 1993); Jack Mendelsohn, *The Martyrs: 16 Who Gave Their Lives for Racial Justice* 153-175 (New York: Harper & Row, 1966).

⁵⁰ Mary Stanton, *From Selma to Sorrow: The Life and Death of Viola Liuzzo* (Athens: University of Georgia Press, 1998).

D. Interest of *Amici*: The BSA vs. Unitarian Universalists

Objecting to the UUA's public witness against institutionalized discrimination on the basis of theological viewpoint and sexual orientation, the BSA has embarked on a policy of discriminating not just against homosexuals, atheists, and agnostics, but against Unitarian Universalists and their children.

As noted above, the BSA was launched by the great Unitarian, William Howard Taft. For decades Unitarian and Universalist churches sponsored Boy Scout troops, and from its creation in 1961 the UUA worked with the BSA so that Unitarian Universalist youth might earn and wear a denominational *Religion in Life* award. But in 1978 the BSA secretly promulgated a policy of discriminating against homosexuals, and then condemned them *publicly* in 1991 – insisting that homosexuals are not “clean.” *See BSA v. Dale*, 530 U.S. at 650. The BSA also began to employ the Scout Oath's promise of “duty to God” to expel atheists, agnostics, and anyone else who would not profess a belief in God to the BSA's satisfaction. *Amicus curiae* Elliott Welsh, now of the Unitarian Universalist Society of Geneva, Illinois, found his own family barred from Scouting – because of their nontheistic religious scruples.⁵¹

⁵¹ *See Welsh v. BSA*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir. 1993). Secretary Rumsfeld cites the Welshes' case to show how the BSA has “successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people.” AOB 3 (quoting *Welsh*, 993 F.2d at 1278).

Unitarian Universalists, who had worked with the BSA for decades, were revolted. The UUA's Board of Trustees resolved in June of 1992, to express "disapproval of the BSA's policy of discrimination against gay and atheist scouts and leaders," and the denomination's *Religion in Life* manual was revised to reflect this. See A10:6, A11. The BSA retaliated by barring Unitarian Universalists from its Religious Relationships Committee (A12:2), suggesting that the UUA's opposition to discrimination "appears to bring to an end our longstanding alliance in serving youth." A15:2. Yet Unitarian Universalist congregations continued to sponsor Scouting troops, and to award *Religion in Life* emblems.

Problems came to a head, when Dr. Lawrence Ray Smith, as Chair of the BSA's Religious Relationships Committee, dispatched a May 7, 1998, letter complaining that the denomination's *Religion in Life* manual "contains several statements which are inconsistent with Scouting's values." A16.

First, the UUA manual said that the BSA "is a secular organization that does not attempt to define or promote a specific theological position." A10:5. This, the BSA insisted, was flatly wrong: "Boy Scouts is not a 'secular organization' as stated in *Religion in Life*; Boy Scouts is an ecumenical organization which requires belief in God and acknowledgement of duty to God by its members." A16.

The BSA also objected to the UUA manual's observation that "[s]ome Unitarian Universalists have trouble with the religious language in the Scout Oath,

Law, and Charter.” A10:5. The BSA insisted that this “inappropriately incorporates doubt in an award process that is designed to forge a stronger link between a youth’s Scouting values and religious life.” A16. The Unitarian Universalists’ open-ended approach to the infinite was simply unacceptable to the BSA.

Finally, the BSA objected to the UUA manual informing children that their denomination’s “General Assemblies have affirmed the rights of gays and lesbians to participate fully and equally in the life of their community,” and that its Board of Trustees thus disapproved of the BSA’s “policy of discrimination against gay and atheist scouts and leaders.” A10:6. “We note with considerable dismay,” Smith wrote, “that this version of *Religion in Life* also includes an official expression of disapproval of Boy Scouts’ membership policies relating to known or avowed homosexuals.” A16.

The BSA letter closed:

The current version of *Religion in Life* does not adhere to Scouting policies and is inappropriate for distribution to Scouting youth in connection with the administration of the Religion in Life religious award. Until such time as the UUA materials can be redrafted to a form acceptable to the Committee, youth may not be awarded a Unitarian Universalist religious emblems [*sic*] in Scouting or wear the emblem on a Scout uniform. This includes the [Cub Scout] Love and Help emblem as well.

A16.

The UUA’s President, the Rev. John A. Buehrens, responded in dismay: “Surely the Religious Relationships Committee of the Boy Scouts of America cannot

intend to tell a religious group what we may teach with regard to our own religious principles.” A17:1. “You risk exposing the BSA to charges of discrimination – not only against a sexual minority, but against entire religious groups, starting with Unitarian Universalism, a movement which has deep spiritual roots in America’s commitment to religious freedom, to democratic values, and to minority rights.” A17:2. “Most Americans will see such actions for what they are: blatant discrimination against children on the basis of their religion.” A17:2.

Indeed, the BSA action garnered national press coverage, with the Chicago Tribune reporting that “the loyal, friendly and cheerful Boy Scouts effectively excommunicated the Unitarians.”⁵²

The two organizations nonetheless managed to negotiate a compromise, again receiving national media coverage.⁵³ The UUA would publish a new edition of *Religion in Life*, omitting material BSA leadership found offensive: “Where we feel it necessary to help Scouts working on the award or Scout leaders acting as advisors to more fully explore Unitarian Universalist understandings of ‘duty to God’ or current

⁵² A18:1 (Kloehn, *Boy Scouts, Unitarians Reach Parting of the Ways*, *supra* note 7; *see also* A19-A28 (Boston Globe, Los Angeles Times, New York Times, Washington Post, *etc.*).

⁵³ A29-A37 (Washington Post, Boston Globe, *etc.*).

BSA policies, the new edition will simply reference other helpful publications available from our Youth Office.”⁵⁴

When the BSA objected to a proposed foreword, Rev. Buehrens agreed to “simply omit” it. A41. With controversial text expurgated, the BSA announced on April 23, 1999, that it “now reauthorizes the awarding of the Religion in Life emblem to Scouts and the wearing of that emblem on a Scout uniform.” A42. “This includes the Love and Help emblem [for Cub Scouts] as well.” A42.

Rev. Buehrens announced, in an April 28, 1999, letter posted on the Internet, that “this conflict has been resolved” by the revised manual, allowing the UUA to provide its youth other “resources appropriate to dealing with issues of homophobia and religious discrimination.”⁵⁵ The BSA’s policies remained troubling; Rev. Buehrens was “very pleased, however, that we have been able to resolve any implication that they wish to practice an added discrimination toward Unitarian Universalists simply because we support the belief that it is not homosexuality but homophobia which is a sin.” A43:2.

This was too much for the BSA, which with a letter dated May 7, 1999, once again disapproved the Religion in Life award, explaining:

⁵⁴ A38:1 (Sept. 30, 1998, letter); *see* A39-A43.

⁵⁵ A43; *see* A44-A46 (manual and materials).

Your letter goes on to say the following: “The new edition of *Religion in Life* will be available from the UUA Bookstore this summer. ***Along with each copy***, the Association will separately provide a letter from me, along with resources appropriate to dealing with issues of homophobia and religious discrimination.” Unfortunately, this simply reopens the entire issue of using boys as a venue to air your differences with the policies of the Boy Scouts of America.

These circumstances were not contemplated Therefore, Boy Scouts of America is not in a position to authorize the awarding of the Religion in Life emblem to Scouts and the wearing of that emblem on a Scout uniform.

A47 (emphasis in original). The BSA’s action again enjoyed widespread press coverage.⁵⁶

The UUA General Assembly nonetheless urged the faithful to get involved in Scouting, and to work for change of the BSA’s discriminatory policies from within.

A54. The BSA responded by requiring all new members to subscribe to a Declaration of Religious Principle, under which every new Cub Scout or Boy Scout must agree that those who do not share a belief in God cannot be “the best kind of citizen.”⁵⁷

Previously, only adult leaders had been required to subscribe to the Declaration.⁵⁸

⁵⁶ E.g., A49-A53 (Boston Globe, Cleveland Plain Dealer, Los Angeles Times, Washington Post, etc.).

⁵⁷ See A1-A9 (new membership forms).

⁵⁸ Murray, *History of the BSA*, at 115 (“Only men willing to subscribe . . . shall be entitled to certification of leadership . . .”); see, e.g., *Welsh*, 742 F. Supp. at 1417 & n.7 (“adult leaders must sign the Declaration of Religious Principle and youth

Following the Supreme Court’s June 2000 ruling that the BSA, as a private organization, is entitled to discriminate, a UUA press release declared that the BSA “cannot have it both ways,” both claiming a right to discriminate, and demanding government sponsorship. A55. “We call upon the Boy Scouts of America to end their discrimination against gays and also to end their discrimination on the basis of religious belief, including discrimination against Unitarian and others whose definition of God is different from the Boy Scouts’ definition.” A55.

Finally, after the BSA’s discrimination against Unitarian Universalists and their children was called to the court’s attention in *Barnes-Wallace v. County of San Diego*, S.D. Cal. No. 00-CV-1726, Docket Entry No. 161 (Declaration of John Hurley), the BSA announced a new religious emblem for Unitarian Universalist youth – developed without the knowledge of, or consultation with, the denomination. *See* A56. With this, the BSA apparently hopes to produce the impression that it no longer discriminates against Unitarian Universalists.

E. Authority for Filing

All parties consented to this brief’s filing. *See* FRAP 29(a).

members are required to acknowledge a duty to God”); *Seabourn v. Coronado Area Council*, 891 P.2d 385, 389 (Kan. 1995).

III. ARGUMENT

A. The Federal Government's Sponsorship of the BSA and its Jamboree Violates the Federal Constitution

Government sponsorship of the BSA and its Jamboree, which make a religious test – a confession of faith – a requirement of membership and participation, surely violates our Constitution's guarantees of religious freedom and of separation of church and state.

Secretary Rumsfeld concedes “that the ‘touchstone of neutrality under the Establishment Clause’ is whether a program ‘differentiates based on the religious status of beneficiaries or providers of services.’” AOB 44 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002)). Yet the BSA Jamboree clearly does differentiate by discriminating against children because of their religious beliefs and – in the case of Unitarian Universalists – denominational affiliation. By excluding many children on the basis of their theology, the Jamboree clearly is a program that “define[s] its recipients by reference to religion.” *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

Citing *Bradfield v. Roberts*, 175 U.S. 291 (1899), Secretary Rumsfeld insists that the government may enter contracts with “religious institutions” to provide secular services. AOB 23-24. But *Bradfield* involved only a contract with a hospital that happened to be operated by Catholics. “Whether the individuals who compose the corporation under its charter happen to be all Roman Catholic, or all Methodists,

or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is not of the slightest consequence,” the Supreme Court held, emphasizing there is “no allegation that its hospital work is confined to members of that church.” 175 U.S. at 298. Had the hospital denied admission to Unitarians or to secular Jews on the basis of their faith, the result surely would have been different.

That the BSA discriminates and excludes on the basis of religious viewpoint is beyond dispute – and has produced considerable social discord. Secretary Rumsfeld acknowledges that Justice Breyer’s concurring opinion in *Van Orden v. Perry*, ___ U.S. ___, 125 S. Ct. 2854, 2868 (2005), describes the religion clauses’ purposes. See AOB 41-42. “They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden*, 125 S. Ct. at 2868. Federal sponsorship of the BSA Jamboree clearly offends this central purpose by placing the government in the center of theological controversy and open sectarian strife.

Relying on the declaration of a confessed child-porn felon, Secretary Rumsfeld says the BSA is nonsectarian and that it “welcomes young people of every religious denomination.”⁵⁹ *Amici* know better. Adults and children who cannot swear an oath

⁵⁹ AOB 6 (citing Declaration of Douglas S. Smith, Jr., BSA National Director of Programs); A57 (Smith’s guilty plea); A58 (Smith’s sentence).

of duty to God – including Elliott Welsh and his children – are shunned. The BSA publicly espouses a rigidly doctrinaire theological hostility not only toward atheists, agnostics, and homosexuals, but toward the Unitarian Universalist denomination.

Secretary Rumsfeld insists that the BSA is a “secular organization.” AOB 42. Yet the BSA revoked approval for Unitarian Universalist emblems insisting the opposite: “Boy Scouts is not a ‘secular organization’ as stated in *Religion in Life*; Boy Scouts is an ecumenical organization which requires belief in God and acknowledgement of duty to God by its members.” A16. A religious faith embracing the dignity and worth of agnostics and homosexuals – and teaching its children that discrimination and shunning are wrong – was simply unacceptable to the BSA. *See* A16.

More than a confession of faith in God is required to participate in the BSA Jamboree – agreement that nontheists are inferior, second-class citizens, has lately become a precondition to BSA membership and participation in Scouting events. A “Declaration of Religious Principle,” now appears on every membership application insisting that “no member can grow into the best kind of citizen without recognizing an obligation to God,” and that only those “willing to subscribe to this Declaration of Religious Principle . . . shall be entitled to certificates of membership.”⁶⁰ Agnostics

⁶⁰ *See* A1-A9 (current membership forms).

and atheists, including most American Jews, thus are shunned as social inferiors – simply not “the best kind of citizen.”

The BSA chooses religious terms, moreover, to condemn homosexuals as *unclean*. A 1991 BSA position paper publicly proclaimed that homosexuality violates “the Scout Law *that a Scout be clean* in word and deed.” *Dale*, 530 U.S. at 652 (emphasis added). The BSA insists “that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms ‘*morally straight*’ and ‘*clean*.’” *Id.* at 650 (emphasis added). And a BSA Task Force apparently recommended retaining the rule, citing “guidance and wisdom from God.”⁶¹

The BSA thus openly adheres to Levitical notions that homosexuality is spiritually unclean. Leviticus 18:22, 20:13. North America’s largest group of Jewish clergy, the Central Conference of American Rabbis (CCAR) condemns discrimination against homosexuals.⁶² So do most Christians – the BSA simply ignores Christian

⁶¹ Plaintiffs-Appellants/Cross-Appellees’ Consolidated Reply/Answering Brief, *Barnes-Wallace*, 9th Cir. Nos. 04-55732 and 04-56167, at 21 n.10 (March 24, 2005) (quoting ER1955-59 (filed under seal)).

⁶² *See, e.g.*, <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=gays&year=1993>; *see also* <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=gl&year=1996>.

scripture renouncing Levitical restrictions: “For all the law is fulfilled in one word, even in this: Thou shalt love thy neighbor as thyself.”⁶³

When the UUA expressed disapproval of discriminatory policies, moreover, the BSA retaliated – first by barring Unitarian Universalists from its Religious Relationships Committee,⁶⁴ and then by disapproving the Unitarian Universalist *Religion in Life* and *Love and Help* awards. See A16, A47. Its object was to silence an outspoken denomination. The BSA said it would permit full participation by Unitarian Universalists only if the denomination agreed not “to air your differences with the policies of the Boy Scouts of America.” A47. The BSA simply would not countenance the denomination teaching its youth that discrimination is wrong and that atheists and agnostics should not be treated as second-class citizens. A16; A47.

Secretary Rumsfeld cites *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), for the proposition that federal sponsorship of the BSA Jamboree must be evaluated from the perspective of a “reasonable observer” fully aware of the program’s history and context. AOB 55. The question in *Capitol Square* was whether allowing the Ku Klux Klan to erect a cross on the Capitol Square Park,

⁶³ Galatians 5:14 (KJV); see Romans 14:13-14 (KJV) (“Let us not therefore judge one another any more: . . . there is nothing unclean of itself.”).

⁶⁴ A12:2 (“Because of the resolution you have passed, I do not see a member of the Unitarian Universalist Association serving on this committee.”).

by the Ohio statehouse, would suggest that the government endorsed the Klan's bigoted religious speech. The Supreme Court held it would not.

Four justices reasoned that giving equal access to a public forum, open to all, cannot offend the Establishment Clause if some use it for religious speech. *Capitol Square*, 515 U.S. at 763-70 (Scalia, J., joined by the Chief Justice, Kennedy, and Thomas, JJ.). “*Of course, giving sectarian religious speech preferential access* to a forum close to the seat of government (or anywhere else for that matter) *would violate the Establishment Clause* (as well as the Free Speech Clause, since it would involve content discrimination).” *Id.* at 766 (emphasis added). The Jamboree fails under this test, for the BSA Jamboree clearly gets the prohibited preferential access and support.

Justice O'Connor, joined by Justices Souter and Breyer, concurred in *Capitol Square*, believing no endorsement of the Klan's message could be inferred by reasonable observers “aware of the history and context of the community and forum in which the religious display appears.” 515 U.S. at 780. No endorsement could be inferred from allowing nonpreferential *equal access* to “places which by long tradition or by government fiat have been devoted to assembly and debate.” *Capitol Square*, 515 U.S. at 781 (quoting *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). “The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if

necessary, by an appropriate disclaimer.” *Id.* at 782. Sponsorship of the Jamboree fails again, for the BSA Jamboree receives preferential access to services denied to others.

Modify the *Capitol Square* facts to parallel this case. A discriminatory religious organization – one that shuns homosexuals as unclean, that shuns nontheists as inferior second-class citizens, and that excludes Unitarian Universalists from full participation – is conferred the right to gather every four years under government auspices, and enjoys a special subsidy exceeding \$7 million for each event. The “special relationship between the United States and the Boy Scouts,” acknowledged by the United States in its amicus brief in *Barnes-Wallace*, *supra* at 8 & n.28, and seen in the federal government’s decision to lavish governmental support on a specific private organization, surely *says something* to reasonable observers. If the government gave such preferential treatment to the Ku Klux Klan – and the Klan alone – what would people think? If public authorities regularly sponsored the Klan’s quadrennial gatherings – spending over \$7 million to subsidize each one – the reasonable observer would have to conclude that the government endorsed the discriminatory organization’s program, hopelessly entangling itself with the organization and its message.

The BSA, of course, is *not* the Klan – it claims no tradition of violence designed to terrorize the minorities it apparently detests. But that means reasonable

observers are all the *more* likely to perceive that the government has endorsed its views. On the facts presented, Judge Manning was right – reasonable observers could only conclude that the government endorsed the Scouts’ message.

IV. CONCLUSION

The judgment below should be affirmed.

DATED: February 2, 2006

Respectfully submitted,

ERIC ALAN ISAACSON
(Counsel of Record)

ERIC ALAN ISAACSON

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

REV. SILVIO NARDONI
535 North Brand Blvd., Suite 501
Glendale, CA 91203
Telephone: 818/550-1800
818/550-1850 (fax)

SUSAN KAY WEAVER
P.O. Box 669
El Cajon, CA 92020
Telephone: 619/368-4562
619/749-1304 (fax)

Counsel for *Amici Curiae*: The Unitarian Universalist Association of Congregations; Elliott Welsh; the Social Justice Committee of the Unitarian Universalist Society of Geneva, Illinois, and its ministers, the Rev. Dr. Lindsay Bates and the Rev. Jennifer Innis; the First Unitarian Church of Cincinnati and its minister, the Rev. Sharon Dittmar; the Social Justice Ministries of All Souls Church, Unitarian, and its Director of Social Justice Ministries, the Rev. Louise Green; the Board of Trustees of the Unity Temple Unitarian Universalist Congregation and its minister, the Rev. Alan C. Taylor; the Social Justice Committee and Board of Trustees of the First Unitarian Universalist Church of San Diego, its ministers, the Rev. Dr. Arvid Straube and the Rev. Julie Kain; and its Director of Religious Education, Elizabeth Motander Jones; and the Unitarian Universalist Legislative Ministry California

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INDEX TO ADDENDA

I, ERIC ALAN ISAACSON, declare as follows:

I am a member of the bar of this Court and have personally assembled this addendum containing true and correct copies of the following documents (several with underscoring or marginal markings in my own hand to call attention to pertinent portions of each):

- A1 Cub Scout application, downloaded March 2005 from the website of BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicbsa.org/forms/context/membership/membership.asp>;
<http://www.sdicbsa.org/docviewer.asp?DocID=csapplicationenglish>.
- A2 Solicitud para Cub Scout, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicbsa.org/forms/content/membership/membership.asp>;
<http://www.sdicbsa.org/docviewer.asp?DocID=csapplicationspanish>.
- A3 Boy Scout application, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicbsa.org/forms/content/membership/membership.asp>;
<http://www.sdicbsa.org/docviewer.asp?DocID=bsapplicationenglish>.
- A4 Solicitud para Boy Scouts, downloaded March 2005, from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicbsa.org/forms/context/membership/membership.asp>;
<http://www.sdicbsa.org/docviewer.asp?DocID=bsapplicationspanish>.

- A5 Varsity Scout application, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicsa.org/forms/content/membership/membership.asp>;
<http://www.sdicsa.org/docviewer.asp?DocID=varapplicationenglish>.
- A6 Venturer application, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicsa.org/forms/content/membership/membership.asp>;
<http://www.sdicsa.org/docviewer.asp?DocID=venapplicationenglish>.
- A7 Solicitud para Venturer, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicsa.org/forms/content/membership/membership.asp>;
<http://www.sdicsa.org/docviewer.asp?DocID=venapplicationspanish>.
- A8 Adult application: BSA Be a Volunteer Leader, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park Headquarters, 1207 Upas Street,
<http://www.sdicsa.org/forms/content/membership/membership.asp>;
<http://www.sdicsa.org/docviewer.asp?DocID=adultapplicationenglish>.
- A9 Adult application: Sea un BSA Líder Voluntario, downloaded March 2005 from the website of the BSA San Diego-Imperial Council's Balboa Park headquarters, 1207 Upas Street,
<http://www.sdicsa.org/forms/content/membership/membership.asp>;
<http://www.sdicsa.org/docviewer.asp?DocID=adultapplicationspanish>.
- A10 Wayne B. Arnason, *Religion in Life: Boys; a Program of Study, Reflection, and Action in Religious Living; for Ages 12-18, and for Unitarian Universalist Boy Scouts Seeking the Religion in Life Emblem Awarded by the Unitarian Universalist Association* (Boston: UUA, 3d ed. 1993).
- A11 September 4, 1992 letter from the Rev. Jory Agate, UUA Youth Programs Director, to David Worley, BSA Relationships Division (from UUA files).

- A12 October 29, 1992 letter from Donald L. Townsend, Director, BSA Relationships Division, to the Rev. Jory Agate, UUA Youth Programs Director (from UUA files).
- A13 December 2, 1992 letter from the Rev. Jory Agate, UUA Youth Programs Director, to Donald Townsend, Director, BSA Relationships Division (from UUA files).
- A14 December 2, 1992 letter from the Rev. Jory Agate, UUA Youth Programs Director, to BSA Religious Relationships Committee Members (from UUA files).
- A15 January 11, 1993 letter from Donald L. Townsend, Director, BSA Relationships Division, to the Rev. Jory Agate, UUA Youth Program Director (from UUA files).
- A16 May 7, 1998 letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director (from UUA files); published on the Internet at http://www.uua.org/news/scouts/scouts_to_uua.html.
- A17 June 11, 1998 letter from the Rev. John A. Buehrens, UUA President, to Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee (from UUA files).
- A18 Steve Kloehn, *Boy Scouts, Unitarians Reach Parting of the Ways*, Chicago Tribune, July 24, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A19 Diego Ribadeneira, *Boy Scouts, Church Spar on Gay Issue*, Boston Globe, July 21, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A20 Diego Ribadeneira, *Boy Scouts' Quarrel with Unitarians Stirs Some Anger*, Boston Globe, July 22, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A21 Kathleen A. Shaw, *Views of Homosexuality Put Unitarians, Boy Scouts in Conflict*, Worcester Telegram & Gazette, July 22, 1998 (downloaded from LEXIS/NEXIS March 2005).

- A22 Caryle Murphy and Hanna Rosin, *Unitarians Taking Boy Scouts to Task; Local Church Members to Protest Stand on Gays*, Washington Post, August 1, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A23 Holly J. Lebowitz, Religion News Service, *Scouts Bar Life Awards Issued by Unitarians; Values: Denomination's Policies on Gays Are at Odds with Scouting, the Organization Says*, Los Angeles Times, August 1, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A24 Gustav Niebuhr, *Religion Journal; Unitarians Are Disputing Boy Scouts on Emblems*, New York Times, August 1, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A25 *Scouts' Gay Stance Riles Unitarians*, San Jose Mercury News, August 2, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A26 Bill Maxwell, *Intolerance as Policy*, St. Petersburg Times, August 9, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A27 Rev. Maureen Thitchener, *It's Sad that Some People Use and Abuse the Bible to Condemn Homosexuality*, Buffalo News, August 11, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A28 Kendall Anderson, *Scouts at Odds with Unitarians; Meeting Set to Discuss Church's Acceptance of Gays, Atheism*, Dallas Morning News, September 26, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A29 Kendall Anderson, *Boy Scouts, Unitarians Hope to Explore Common Ground in Rift Over Gays, Beliefs*, Buffalo News, October 3, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A30 Caryle Murphy, *Scouts, Church Close to Settling Dispute*, Washington Post, October 10, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A31 Kendall Anderson, *Boy Scouts Officials, Unitarians Meet*, Dallas Morning News, October 10, 1998 (downloaded from LEXIS/NEXIS March 2005).
- A32 Diego Ribadeneira, *Unitarians, Scouts Reach Compromise*, Boston Globe, April 30, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A33 *Scouts, Unitarians Reach Accord*, Dallas Morning News, May 1, 1999 (downloaded from LEXIS/NEXIS March 2005).

- A34 Kathleen A. Shaw, *Boy Scouts, Church Resolve Differences on View of Homosexuality; Unitarians Agree to Make Changes in Manual*, Worcester Telegram & Gazette, May 5, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A35 Caryle Murphy, *In Brief: Unitarians, Scouts Settle Dispute*, Washington Post, May 8, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A36 *Unitarians, Scouts Settle Dispute*, Orlando Sentinel, May 8, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A37 *Unitarians, Scouts Agree to Disagree*, Chicago Tribune, May 14, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A38 September 30, 1998 letter from the Rev. John A. Buehrens, UUA President, to Dr. Lawrence Ray Smith, Chair, BSA Religious Relationship Committee (from UUA files; text published on the Internet at <http://www.uua.org/news/scouts/buehrens9-30.html>).
- A39 October 19, 1998 letter from Dr. Lawrence Ray Smith, Chairman, BSA Religious Relationships Committee, to Dr. John A. Buehrens, UUA President (from UUA files; text published on the Internet at http://www.uua.org/news/scouts/rrc_letter.html).
- A40 March 18, 1999 letter from Thomas R. Deimler, Director, BSA Relationships Division, to Dr. John A. Buehrens, UUA President (from UUA files).
- A41 March 30, 1999 letter from the Rev. John A. Buehrens, UUA President, to Thomas R. Deimler, Director, BSA Relationships Division (from UUA files).
- A42 April 23, 1999 letter from Thomas R. Deimler, Director, BSA Relationships Division, to the Rev. Dr. John A. Buehrens, UUA President (from UUA files).
- A43 April 28, 1999 open letter from the Rev. John A. Buehrens, UUA President, to "Friends" (from UUA files; text published on the Internet at http://www.uua.org/news/scouts/scouts_correspondence8.html).
- A44 The Rev. Cynthia Breen and the Rev. Keith Kron, *Religion in Life: A Program of Study, Reflection, and Action in Religious Living; a Program*

in Unitarian Universalist Identity for Ages 12-18; Suitable for Youths in the UUA Boy Scout Emblem Award Program (Boston: UUA, 4th ed. 1999).

- A45 The Rev. John A. Buehrens, *When Others (or You) Say "GOD": Some Thoughts for Youth* (Boston: UUA, 1999).
- A46 The Rev. Keith Kron, *In Support of All People: Unitarian Universalism and Our Support for Bisexual, Gay, Lesbian, and Transgender People* (Boston: UUA, 1999).
- A47 May 7, 1999 letter from Dr. Lawrence Ray Smith, Chairman, BSA Relationships Committee to Dr. John A. Buehrens, UUA President (from UUA files; text published on the Internet at http://www.uua.org/news/scouts/scouts_correspondence9.html).
- A48 May 18, 1999 open letter from UUA President John A. Buehrens (downloaded April 2005 from http://www.uua.org/news/scouts/scouts_correspondence10.html).
- A49 Diego Ribadeneira, *Church Says It Will Defy Scouts' Order on Badges*, Boston Globe, May 19, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A50 *Scouts' Honor*, Cleveland Plain Dealer, May 22, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A51 Caryle Murphy, *In Brief: Unitarian-Boy Scout Agreement Collapses*, Washington Post, May 29, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A52 Religion News Service, *Religion in Brief: Boy Scouts Rescind Offer to Unitarians*, Los Angeles Times, May 29, 1999 (downloaded from LEXIS/NEXIS March 2005).
- A53 Rev. Richard S. Gilbert, *Boy Scouts Err in Discriminating Against Gays*, Rochester Democrat & Chronicle, July 3, 2000 (downloaded from LEXIS/NEXIS March 2005).
- A54 1999 UUA General Assembly Resolution: *Work to Change Discriminatory Policies of the BSA* (downloaded March 2005 from <http://www.uua.org/actions/immediate/99bsa.html>).

- A55 UUA June 20, 2000 press release: *Religious Leader Decries Court Ruling* (downloaded from Internet: <http://www.uua.org/pressroom/pr.php?PRID=3>).
- A56 Programs of Religious Activities with Youth: P.R.A.Y. Boy Scout News Bulletin, first quarter 2005 (downloaded from the Internet March 2005: http://www.praypub.org/publications/BSQ1_05.htm).
- A57 *United States v. Douglas Sovereign Smith, Jr.*, N.D. Tex. No. 4:05-CR-040-Y (March 30, 2005), Factual Resume and Guilty Plea of Douglas Sovereign Smith, Jr., to Receipt and Distribution of Child Pornography, 18 U.S.C. §§2252A(a)(2)(A)(b)(1), and 3583(k).
- A58 *United States v. Douglas Sovereign Smith, Jr.*, N.D. Tex. No. 4:05-CR-040-Y (Dec. 6, 2005), Judgment in a Criminal Case, committing Douglas Sovereign Smith, Jr., to prison for a term of 96 months.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1st day of February, 2006, at San Diego, California.

ERIC ALAN ISAACSON

CERTIFICATE OF COMPLIANCE

The undersigned counsel certified that the **AMICI CURIAE BRIEF OF THE UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, ET AL. – SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE** uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 6,984 words according to the word count provided by Microsoft Word 2002 word processing software.

ERIC ALAN ISAACSON

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on February 2, 2006, declarant served **AMICI CURIAE BRIEF OF THE UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, ET AL. – SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE** by depositing two true copies thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. On the same date, declarant filed one original and 15 copies of **AMICI CURIAE BRIEF OF THE UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, ET AL. – SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE** with the Clerk of the Court by depositing in a United States mailbox at San Diego, California in a sealed package with postage thereon fully prepaid.

4. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of February, 2006, at San Diego, California.

TAMARA THWEATT