No. 05-3451

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, *et al.*, *Appellees,*

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *Appellant.*

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF FOR *AMICUS CURIAE* THE AMERICAN LEGION IN SUPPORT OF APPELLANT AND REVERSAL

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RULE 26.1 CERTIFICATE

Amicus curiae The American Legion is a nonprofit corporation chartered by an Act of Congress 1919. It has no parent corporations and no publicly held company owns any stock in The American Legion. The only counsel appearing in this case for The American Legion are those listed on the cover. The law firm of Erik S. Jaffe, P.C. has no other partners or associates.

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INTEREST OF *AMICUS* AND AUTHORITY TO FILE

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our armed services, and long has worked to foster patriotism, character, and good citizenship. An Act of Congress chartered the Legion as a corporation in 1919. Act of September 16, 1919, ch. 59, 41 Stat. 284 (currently codified at 36 U.S.C. §§ 21701-08). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. 36 U.S.C. § 21702.

The Legion long has supported the Boy Scouts of America. Indeed at its first national convention in 1919, the Legion adopted a resolution that read, in part: "The American Legion heartily commends the principles and achievements of the Boy Scouts and recommends that each post assist the Scout troop in its community in whatever manner practicable." Since that time the Legion's support for the Boy Scouts has remained unstinting. Legion posts throughout the United States routinely sponsor and support Boy Scout troops with financial and personal assistance. They currently support more than 2600 Boy Scout troops nationwide. And in 2000, while *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), was pending, the Legion reaffirmed its fundamental view that the Boy Scouts should retain the liberty to maintain membership and leadership standards.

More saliently, the Legion, like other groups, is committed to maintaining its own liberty to administer standards and membership policies consistent with its organizational goals. As a voluntary veterans organization, the Legion is vitally interested in associational freedom. There is no test for Legion membership other than honorable military or naval service to the United States. *See* 36 U.S.C. § 21703.

This case presents a grave challenge to any voluntary organization. It is a case about the freedom of association masquerading as a case about the establishment of religion. For if the acknowledgement of God is deemed sufficient to adjudge the Boy Scouts ineligible for non-religious support from the military, consistent with the military's own recruitment, public-relations, and training goals, then any number of other voluntary organizations with theistic roots will be equally affected. If allowed to stand, the decision of the district court will greatly limit the fundamental liberty of a voluntary organization to endorse traditional American values without suffering a governmental penalty because of its viewpoint. Thus, this case is, in the end,

about the core American virtues of freedom to speak and freedom to associate – the very freedoms that Legion members fought to preserve through their wartime service to our Nation. For this reason the Legion has elected to participate as *amicus curiae*, urging reversal of the district court's decision.

Counsel for all the parties have consented to the filing of this *amicus* brief. Accordingly this brief is authorized pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT

This appeal involves an Establishment Clause challenge to 10 U.S.C. § 2554, which authorizes the Department of Defense (DOD) to perform support and other activities in connection with the periodic National Scout Jamboree (NSJ). While DOD had conducted such activities in connection with the NSJ since 1937 pursuant to its general (and wholly neutral) authority and practices regarding training, recruiting, public relations, and civic support, in 1972 Congress enacted § 2554 to confirm, and to some degree limit, DOD's authority relative to the NSJ. The statute provides, *inter alia*, that the Secretary of Defense is permitted (though not required) to "lend" durable supplies such as cots, blankets, commissary equipment, and flags for use in connection with the NSJ, § 2554(a), may "furnish" services and expendable medical supplies in connection with the NSJ, *id.*, may "provide, without expense to the United States Government," transportation of persons and equipment to the NSJ, § 2554(d), and may "provide" personnel services and logistical support if the NSJ is held on a military installation, § 2554(g). The statute also imposes the significant limitations that the United States not incur expense (*i.e.*, must be reimbursed) for the "delivery, return, rehabilitation, or replacement of" materials loaned for use at the NSJ or for transportation provided for persons and materials. § 2554(b)-(e). The

statute neither addresses nor limits various other military activities such as recruiting, public relations, dual-purpose training activities, or site improvements to military bases.

Ruling on cross-motions for summary judgment, the district court below held that § 2554 violated the Establishment Clause. In reaching that conclusion the court first held that the Boy Scouts was "religious" for purposes of the Establishment Clause and then applied the two-part *Lemon* test inquiring into a challenged action's purpose and effect as originated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), and modified in subsequent cases. *See* Memorandum and Order, March 16, 2005 (hereinafter "Mem.") at 36. Because plaintiffs had not alleged an improper purpose to promote religion, the district court relied only on the second part of the *Lemon* test, which asks whether a challenged statute has the "principle or primary effect" of advancing or inhibiting religion. 403 U.S. at 612-13; Mem. at 37. Considering the three factors under the effects part of the *Lemon* test – whether the program at issue results in governmental indoctrination, defines its recipients by reference to religion, or creates excessive entanglement between government and religion – the court noted that plaintiffs had not alleged any excessive entanglement. Mem. at 37.

Turning to the remaining two factors, however, the court concluded that § 2554 did indeed define its recipients by reference to religion because "Congress simply has authorized the appropriation of a certain amount of funds to be used solely in support of the NSJ"; the "aid is not available to both religious and secular beneficiaries"; and that the only beneficiary is the" Boy Scouts. Those qualities, according to the court, caused "concern about financial incentives" to undertake religious indoctrination and the risk "that as a result, once could attribute to the government any indoctrination by the" Boy Scouts. Mem. 38. The district court also found that the statute results in government indoctrination for essentially the same reasons, arguing that the

statute "is not offered to a broad range of groups; rather it is specifically targeted toward the Boy Scouts," and that the aid is not allocated based on the independent private choices of individuals but instead "is provided directly to the Boy Scouts pursuant to the singular choice of Congress to provide a significant amount of aid (almost $8 million in 2005) to the [NSJ] to the exclusion of other possible recipients." *Id*. at 39. Given the statute's supposed lack of neutrality toward religion in allocating its aid, the court found that "a reasonable observer would conclude that the [§ 2554] conveys a message of endorsement of religion" and thus violates the Establishment Clause. *Id*. at 40.

ARGUMENT

I. THE SUPREME COURT HAS SHIFTED TO A LOOSER CONTEXTUAL/HISTORICAL APPROACH IN ANALYZING ESTABLISHMENT CLAUSE CHALLENGES.

In applying the *Lemon* test the district court understandably was following the then-latest precedents from the Supreme Court and limited its focus to the particular components of that test. Mem. at 26 n. 9. Since the district court's decision, however, three new Establishment Clause cases have been decided by the Supreme Court, with not one of them relying on the "effects" analysis under the *Lemon* test. Those cases illustrate that regardless whether *Lemon*'s "purpose" inquiry remains important or whether its formulation of the "effects" inquiry may still be applied in a few limited areas, in general the Court has shifted to a looser and broader inquiry that examines the context and history of a challenged action in light of the underlying purposes of the Establishment Clause. While the elements of *Lemon*'s effects analysis may still be pertinent to such an inquiry, such elements will not be dispositive and must be balanced against the overall context before concluding that an Establishment Clause violation has occurred. Under this expanded approach, DOD's support for the NSJ does not even come close to violating

the Establishment Clause. The history, context, and magnitude of the challenged conduct all point towards an overwhelmingly secular purpose and effect that poses no risk of "establishing" religion or creating the sectarian divisiveness against which the Establishment Clause was designed to guard.

A. *Lemon*'s "Effects" Analysis No Longer Controls Establishment Clause Cases, But Is, at Best, Only One of Several Means To Shed Light on a Particular Program Being Challenged.

Since the district court issued its opinion in this case, the Supreme Court has decided three Establishment Clause cases, none of which relied on *Lemon*'s effects analysis to reach its result. Rather, the Court considered a range of historical and contextual factors in light of the overarching purpose of the Establishment Clause. Insofar as the effects elements of the *Lemon* test were considered, they were merely part of the mix and not definitive or rigid measures of the validity of the challenged conduct.

In *Cutter* v. *Wilkinson*, -- U.S. --, 125 S. Ct. 2113 (2005), for example, the Supreme Court rejected a challenge to enhanced religious accommodation for state prisoners required by the Religious Land Use and Institutionalized Persons Act (RLUIPA). As Justice Thomas correctly noted in his concurrence, the "Court properly declines to assess RLUIPA under the discredited [*Lemon*] test * * *, which the Court of Appeals applied below." 125 S. Ct. at 2125 n. 1 (Thomas, J., concurring). Instead, Justice Ginsburg, writing for a unanimous Court, analyzed RLUIPA in light of a long history of accommodating religious practices, the oft-recognized "room for play in the joints" between the Establishment and Free Exercise Clauses, the particular prison context of the accommodation, and the non-sectarian nature of the benefit conferred to religious persons generally, as well as the absence of any comparable accommodation for prisoners' political or other non-religious activities. 125 S. Ct. at 2117, 2121, 2123-24. That

RLUIPA necessarily defined the recipients of its benefits according to religion (in conflict with part of the *Lemon* effects test) gave the Court little pause in rejecting the Establishment Clause challenge.

In *Van Orden* v. *Perry*, -- U.S. --, 125 S. Ct. 2854 (2005), and *McCreary County* v. *ACLU*, -- U.S. --, 125 S. Ct. 2722 (2005), the Court considered whether the display of the Ten Commandments on government property violated the Establishment Clause, reaching opposite conclusions in the two cases. In neither case, however, did the effects portion of the *Lemon* test provide the rationale for decision. Writing for the plurality rejecting the Establishment Clause challenge in *Van Orden*, Chief Justice Rehnquist observed that "just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.'" 125 S. Ct. at 2861 (plurality opinion) (quoting *Hunt* v. *McNair,* 413 U.S. 734, 741 (1973)). He went on to note that "[m]any of our recent cases simply have not applied the *Lemon* test. * * * Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test." 125 S. Ct. at 2861 (plurality opinion) (citations omitted). The plurality concluded that, "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id*. at 2861.

Justice Breyer, who provided the critical fifth vote in both *Van Orden* and *McCreary County*, similarly eschewed use of the *Lemon* test. He instead observed that "there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.' * * * One must refer instead to the basic purposes of [the Religion] Clauses. They seek to 'assure the fullest possible scope of religious liberty and

tolerance for all.' * * * They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (citations omitted). Justice Breyer aptly observed that the various formulaic "tests" occasionally used by the Court were both insufficient and potentially damaging to the goals of the Establishment Clause. The "neutrality" test, he noted, "'can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'" *Id*. at 2868-69 (citation omitted). He likewise rejected the Court's other tests (including *Lemon*) suggesting that their seeming suspicion of religion cannot "readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, * * * certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving." *Id*. at 2869 (citations omitted).

Thus, even in a case where the religious element of the government's conduct was far starker and explicit than in this case, Justice Breyer still insisted that context was king: "[T]o determine the message that the text here conveys, we must examine how the text is *used.* And that inquiry requires us to consider the context of the display." *Id*.

Finally, in *McCreary County*, it was only *Lemon*'s "purpose" component that was at issue, not its effects analysis. But even there, a different majority of the Court relied extensively on history, context, and implementation of the challenged action and repeatedly emphasized the underlying purposes of the Establishment Clause, including the avoidance of divisiveness and strife. *See, e.g.*, 125 S. Ct. at 2734-35, 2737-38, 2743. And given the fact that Justice Breyer

provided the decisive fifth vote in both *McCreary County* and *Van Orden*, it is fair to conclude that a more open-textured analysis is here to stay, with considerably less of the formulism of *Lemon*'s effects test and with history, context, and the central purposes of the Establishment Clause being weighed according to the particular circumstances of future cases.

This Court likewise should apply that broader approach when evaluating DOD's support for the NSJ.

B. A Proper Focus on Context and History Fully Supports DOD's Activities Related to the NSJ.

The district court reached its conclusion by erroneously focusing on the single fact that § 2554, authorizing (but not requiring) the traditional support provided by DOD to the NSJ, applied to the Boy Scouts alone and thus, because it deemed the Boy Scouts to be a religious organization, defined its beneficiaries by reference to religion. Mem. at 38-39.[1] An expanded perspective regarding DOD's involvement with the NSJ, however, shows that its context and history raise no material cause for concern under the Establishment Clause.

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[1] The Legion takes issue with the characterization of the Boy Scouts as a religious organization for Establishment Clause purposes, though it will assume, *arguendo* the correctness of that characterization for the purposes of this *amicus* brief. The Legion notes, however, that the Boy Scouts is not in any sense a religion or a religious institution in the manner of a church or a religious school. Rather, it is primarily a civic organization founded on a multitude of predominately secular principles but that also has chosen to promote the non-sectarian concepts of reverence and duty to God as supportive of its secular interests in good citizenship and youth development. Many civic entities, including the Legion itself, count among their principles a duty to and respect for God, and that is undoubtedly within their rights of free expression and freedom of association. But that hardly changes such entities into religious organizations for the purposes of the Establishment Clause. Insofar as the Supreme Court has acknowledged some "play in the joints" between the Establishment Clause and the Free Exercise Clause, it seems wholly proper to conclude that such play likewise leaves room for organizations to have some religious aspect to their principles without triggering the burdens of Establishment Clause scrutiny of their every interaction with government.

First, DOD's support for the NSJ must be viewed in the context of other comparable or related DOD activities. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 673 (2002) (O'Connor, J., concurring) ("Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions."). Rather than being a stand-alone program, DOD's involvement with the NSJ is part of a broader program of DOD recruitment, public relations, training, and civic support activities. DOD has identified numerous examples of statutory and regulatory provisions covering a broad range of DOD activities that benefit private organizations and events and that likewise provide authority for DOD's NSJ-related activities, many of which are not even mentioned in § 2554. Gov't Br. at 9-11, 47-48; *see also* 10 U.S.C. § 2551 (support for national convention or national youth athletic or recreation tournament conducted by any recognized national veterans' organization); *id*. § 2556(a) (support and cooperation with governments and charitable organizations in provision of shelter and services to homeless persons). Such broad-ranging authority and activity provides the context surrounding the Jamboree statute, § 2554, and illustrates that it did not just arise out of thin air in isolation but was simply one more tile in a robust mosaic of related activities.

Such an expanded perspective demonstrates that rather than being targeted exclusively to the Boy Scouts, DOD's many civilian support activities and "beneficial" interactions are distributed across a wide range of organizations in a variety of situations compatible with DOD's own secular interests, with no suggestion that the criteria used by DOD are anything other than neutral as between religious and secular entities. Particularly when considering whether § 2554 somehow sends a message of religious favoritism, '[a]ny objective observer familiar with the full history and context of the [provision] would reasonably view it as one aspect of a broader

undertaking" serving a variety of DOD secular interests, "not as an endorsement of" the limited religious views of the Boy Scouts. *Zelman*, 536 U.S. at 655.

Furthermore, even the district court's limited focus on § 2554 suffers from a seeming misunderstanding of what the law says and how it relates to DOD's training, recruitment, public relations, and civilian support activities. Thus, while the court claimed that § 2554 authorized the "appropriation of a certain amount of funds" to be used "solely" for the NSJ, that such aid is not available to both religious and secular beneficiaries, and that it was the "singular choice of Congress to provide a significant amount of aid" to the NSJ "to the exclusion of other recipients," that is simply not an accurate description of the statute. In fact, § 2554 neither "provide[s]" aid nor "appropriate[es]" funds at all, and it certainly does not earmark any funds for sole use of the NSJ to the "exclusion" of other possible recipients. All the statute does is authorize (and limit) certain DOD support for the NSJ insofar as DOD itself chooses to provide such support. The statute does not *require* DOD to furnish such support and there is absolutely nothing to suggest that the sources of funds DOD draws upon for its NSJ activities are not just as readily available for activities involving any other organization that approaches DOD with similarly beneficial training, recruitment, public relations, or civilian support opportunities.[2]

Second, DOD has a long history of supporting the NSJ, dating back to 1937 and existing for most of that time without § 2554.[3] Throughout that history there has been nary an objection

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[2] Indeed, § 2554(f) indicates that such funds *are* available for comparable activities with other organizations, stating that any reimbursement of DOD funds expended on the NSJ will be credited back to the accounts from which they came and "shall be available for the same purposes as" those accounts.

[3] In fact, the "authorization" portion of § 2554 seems largely redundant with DOD's longstanding authority and it is only the intertwined reimbursement and bonding requirements that break new ground.

and this lawsuit seems to be the first and only hiccup in that uncontroversial interaction. The absence of any demonstrable divisiveness over such a long period provides both historical and contextual evidence that the purposes of the Establishment Clause are not being jeopardized. Indeed, just such a tranquil history was the "determinative" factor for Justice Breyer in the *Van Orden* case where the Ten Commandments monument had stood unchallenged for 40 years. "[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect [or] primarily to promote religion over nonreligion." 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment). In this case, DOD's support for the NSJ has stood uncontested for nearly 70 years and involves nothing even remotely as religious as the display of the Ten Commandments. "That experience helps us understand that as a practical matter of *degree* [support for the NSJ] is unlikely to prove divisive." *Id*. at 2871 (emphasis in original). Where that "matter of degree" was "critical in a borderline case such as" *Van Orden*, *id*., it should be far more significant in this case, which raises infinitely fewer red flags.

Third, the particular nature and "use" of DOD's support for the NSJ demonstrates its benign and wholly secular character. The "support" provided for the NSJ consists exclusively of in-kind goods and services, and the various durable goods are merely provided on loan for the event, with associated costs of transportation, repair, or replacement of such goods required to be reimbursed by the Boy Scouts. § 2554. Such "support" has no religious content at all, is not readily convertible into anything having religious content, and does not inure to the benefit of the Boy Scouts beyond the limited time frame of the NSJ once every four years. Furthermore, the "services" DOD provides are substantially ceremonial and DOD-focused, aimed at promoting

the Armed Services to the Scouts and the visiting public rather than aimed at promoting the Boy Scouts. Other services provided are of dual-function for the military, improving the facilities at Fort A.P. Hill, to the military's and the public's benefit for all but 10 days every four years, and creating training opportunities in dealing with large numbers of people and the logistics that requires.

The support DOD provides also is used for the substantial benefit of the non-Scouting public visitors to the NSJ, who in fact represent the vast majority of persons attending the event by an almost 5-1 margin. Gov't Br. at 7 n. 1. Those visitors, neither affiliated with the Boy Scouts nor limited in any way by their religion or lack thereof, comprise most of the audience for the military's ceremonial and promotional activities, create a substantial portion of the demand for logistical services, and no doubt require a fair share of the consumable goods (such as medical supplies). That much of the military's support benefits visitors *not* defined by reference to religion both minimizes any concern regarding discriminatory favoritism toward religion, and substantially enhances the secular nature of any "message" DOD's involvement might send.

Fourth, as Justice Breyer noted in *Van Orden*, the "physical setting of" the NSJ "suggests little or nothing of the sacred." 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment). Where the Texas Ten Commandments monument was set "in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of" Texans, *id*., the few religious activities and areas at the NSJ are set in an expansive outdoor environment containing far more numerous areas and activities relating to outdoorsmanship, science, education, and good citizenship. That "setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of" the Boy Scouts's numerous secular interests and ideals. To the extent DOD's involvement implicitly communicates a message

concerning the Boy Scouts, therefore, it is a message overwhelmingly relating to those secular matters, just as the Ten Commandments monument, in context, communicated a moral, not a religious, message.[4] As in *Van Orden*, therefore, "the context suggests that" Congress and the DOD intended a secular message "to predominate." *Id*.

Fifth, DOD support benefits the *event*, not the Boy Scouts as an entity, and thus any connection with the Boy Scouts's overall "religious message" is even more attenuated. Furthermore, DOD is insulated from any religious activities at the event itself given that it is the Boy Scouts, not DOD, that sponsors the NSJ and thus, like the sponsorship by the Fraternal Order of Eagles in *Van Orden*, "further distances [DOD] itself from" any "religious aspect" of any message sent by the NSJ. *Id*. at 2870; *cf.* Fraternal Order of Eagles International Website, www.foe.com (illustrating analogous "religious" aspects of the Eagles and the Boy Scouts, though both are predominately "civic" organizations; "As members of the Fraternal Order of Eagles, we are united in our belief in a supreme being").

Sixth, DOD's involvement with the NSJ has substantial elements of an exchange, not merely one-sided support. The Boy Scouts contributes substantial resources for improvements to Fort A.P. Hill in connection with the NSJ that benefit DOD after the event is over. *See* Gov't Br. at 17 (discussing millions of dollars in permanent improvements paid for by the Boy Scouts pursuant to a letter of understanding with the Army). That reciprocity of benefits, even if DOD ultimately expends more than it receives, further undermines any supposed message of religious endorsement. Rather, it suggests pursuit of a joint interest in the outdoor areas and facilities of a

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[4] And the military's own direct contribution to that environment – the outdoor adventure area – communicates only a message regarding the virtues and excitement of military service, not anything at all regarding religion.

venue that speaks to the shared fitness, sporting, and related secular values of the Boy Scouts and the military.

Seventh, even assuming, *arguendo*, some implied or perceived support for the Boy Scouts's non-sectarian message of reverence and a duty to God, such limited acknowledgement of religiosity is not even remotely out of line with a long history of government acknowledgement of and even preference for religion in general since the time of the Founders through today. *See Van Orden*, 125 S. Ct. at 2861 (plurality opinion) ("'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'") (citation omitted); *Elk Grove Unified School Dist.* v. *Newdow,* 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths"); *Lynch* v. *Donnelly,* 465 U.S. 668, 675 (1984) ("Our history is replete with official references to the value and invocation of Divine guidance"). In light of that history it would be anomalous, to say the least, to strike down § 2554 even assuming it conveyed some implied endorsement of the Boy Scouts's non-sectarian view that reverence to God is one among numerous valuable qualities in a person. Such a result is not required by the Establishment Clause. *See Van Orden*, 125 S. Ct. at 2859 (plurality opinion) ("'When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.'") (citation omitted); *id*. at 2860 n. 3 ("[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.") (citations omitted).

Eighth, any implied or perceived religious message coming from DOD's support for the NSJ is overwhelmed by the overall secular messages of patriotism, good citizenship, general ethics, and soundness of mind and body. Even assuming some implied support for Boy Scouts's religious message, that message is not remotely as "religious" or clear as the sectarian message conveyed by displaying the Ten Commandments. In *Van Orden*, both the plurality and Justice Breyer recognized that the monument conveyed *both* a religious and a secular message, but nonetheless found that the secular message predominated and that such a dual message did not offend the Constitution. *See* 125 S. Ct. at 2863 (plurality opinion) ("Of course, the Ten Commandments are religious – they were so viewed at their inception and so remain. * * * Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *id*. at 2864 (monument "has a dual significance, partaking of both religion and government."); *id*. at 2870 (Breyer, J., concurring in the judgment) (the display "communicates not simply a religious message, but a secular message as well. The circumstances * * * suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate."). In this case whatever religious "message" is conveyed by § 2554, it is an infinitely smaller component of the overall message than was the case in *Van Orden*, and the predominance of the secular message is a heavy factor in support of the statute's constitutionality.

Finally, DOD's support for the NSJ carries no credible risk of divisiveness and, if anything, there is a far greater risk of divisiveness from a forced dissociation. "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. *See*, *e.g., Marsh* v. *Chambers,* 463 U.S. 783 (1983). Such absolutism is not only inconsistent with our national traditions, * * * but would also tend to

promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (citations omitted). Terminating DOD's longstanding support for the NSJ based on the limited "religious" nature of the Boy Scouts would communicate to many if not most religious citizens a hostility toward religion, would encourage further disputes seeking to dissociate the government from numerous other entities of greater or lesser religious character, and "could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id*. at 2871.

II. EVEN UNDER THE *LEMON* TEST, PROPERLY APPLIED, DOD SUPPORT FOR THE NSJ DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Regardless whether the *Lemon* test is viewed as a controlling formulation or simply a factor in a broader inquiry, DOD's support for the NSJ amply satisfies that test. The absence of any improper *purpose* is conceded. This case thus is quite unlike *McCreary County*, where the government had a clear religious purpose in posting the Ten Commandments. Likewise, there is no claim of excessive entanglement. Under the *Lemon* test's effects analysis, therefore, the only remaining issues are whether DOD's actions involve government indoctrination of religion and whether the beneficiaries of those actions are defined based on religion. Properly analyzed, neither factor is present here.

A. The District Court Erroneously Limited Its Analysis to the Effects of § 2554, Ignoring the Overall Scope and Effects of DOD's Support for Numerous Civilian Events and Organizations.

When evaluating whether the government conferral of benefits here defined its recipients based on religion or involved government indoctrination of religion, the district court improperly limited its focus to the single provision authorizing the traditional DOD support of the NSJ, and ignored the numerous other facets of DOD's comparable activities that provide direct and

indirect benefits to a plethora of civilian entities. As discussed in the previous sections, DOD provides ceremonial services, event support, and engineering assistance, and numerous other benefits to a broad range of civilian groups and governmental entities. Such DOD activities are part of its training, recruitment, and public relations activities no less than its support for the NSJ, and any reasonable observer would view DOD's support for the NSJ in that context to determine whether such activities have the "primary effect" of favoring religion.

In *Zelman* v. *Simmons-Harris*, the Supreme Court explicitly endorsed the notion of evaluating the effect of a challenged program in the context of related government conduct. At issue in *Zelman* was an Establishment Clause challenge to the Cleveland school voucher program. The only issue in the case was whether the program had the "effect" of advancing or inhibiting religion. Although the majority of private schools participating in the program were religiously affiliated, and the vast majority of students in the program attended such schools, 536 U.S. at 647, the Court nonetheless looked beyond the voucher program itself and evaluated the full range of alternative schools funded by the State through a variety of other means. Writing for the Court, Chief Justice Rehnquist recognized that the voucher program should not be viewed in isolation, but rather was "part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren." 536 U.S. at 647; *see also id.* at 653 (voucher program "part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district"); *id.* at 655 ("Cleveland schoolchildren enjoy a range of educational choices" funded by state money); *id*. 681 (Thomas, J., concurring) (same).

Just as the specific voucher program in *Zelman* could not be viewed apart from Ohio's other educational programs for Cleveland students, the question whether DOD is improperly

advancing religion by defining the beneficiaries of its activities according to religion "must be answered by evaluating *all*" DOD civilian support activities and authority to see if they collectively create some pressure for beneficiaries to be religious. *Zelman*, 536 U.S. at 656. The mere fact that DOD's decades-old support for the NSJ was subsequently authorized (and limited) with a specific statutory provision provides no basis for viewing it in isolation when asking whether the beneficiaries of DOD activities are defined based on religion. To do so "is to ignore how [DOD's training, recruitment, public relations, and civilian support activities] actually function[]." *Id*. at 663 (O'Connor, J., concurring).

Such tunnel-vision could be applied to virtually any government activity to make it look like it improperly favored religion by focusing only on a single instance where a religious entity happened to be the beneficiary. But that narrow perspective is *not* the law and not the correct way to apply the *Lemon* test. Indeed, the Court in *Zelman* expressly condemned "the arbitrariness of counting one type of school but not the other to assess primary effect," and noted the absence of any "convincing justification for [such an] approach, which relies entirely on such arbitrary classifications." 536 U.S. at 660. The mere fact that other DOD activities are not mentioned in the *specific statutory section* authorizing support for the NSJ is no reason to exclude other comparable DOD activities, whether authorized by their own separate sections or undertaken according to DOD's general authority (as had been the case with the NSJ for decades). The *Zelman* decision flatly rejected the analogous claim by the dissent and noted that there is no "perceptible difference between scholarship schools, community schools, or magnet schools" for purposes of evaluating the effect of the voucher program. *Id*. at 660 n. 6.

Stepping back and properly evaluating the breadth of DOD's training, recruitment, and public relations activities as a whole should make it perfectly clear to any reasonable observer

that the DOD does not define the beneficiaries of such activities on the basis of religion and that the activities do not even remotely constitute government indoctrination of religion.

B. The District Court Improperly Elevated a Lone Fact – that § 2554 Involves Only the NSJ – into a Singular Determinant of an Establishment Clause Violation.

Even assuming, *arguendo*, that the effects inquiry should be limited to § 2554 alone, and that support for the discrete event of the NSJ constitutes support for a "religious" entity, it still is unreasonable to conclude that such support has the *primary* effect of advancing religion. The only factor identified by the district court in support of that conclusion is that § 2554 defines its beneficiaries based on religion because it applied only to the Boy Scouts. Mem. at 38. And it bootstrapped that finding into the sole basis for concluding that § 2554 involved government "indoctrination" of religion. *Id*. at 39-40. In this case, however, the connection between § 2554 being limited to the NSJ and any effect on religion is so weak and attenuated that it cannot by itself support the conclusion that the "primary effect" of the statute is to promote religion.

First, as explained in Part I, *supra*, the Boy Scouts is a multifaceted civic group wholly unlike a church or a religious school whose primary function is to inculcate and practice a particular set of sectarian beliefs. While the Boy Scouts certainly includes reverence and a duty to God as among its guiding principles and messages, they are hardly its only or even its primary principles and messages. Similarly, any religious aspect of the NSJ itself is but a minor component of the overall event, is entirely voluntary on the part of the visiting Scouts, and seems to be a virtually non-existent factor for the hundreds of thousands of visitors from the general public who attend the event without any requirement that they even acknowledge, much less adhere, to the generic religious messages and principles of the Boy Scouts. To the extent that the § 2554's authorization of wholly secular support for the NSJ can be said to make a religious

statement at all, it is at best a mixed message with only a tiny component of that message being endorsement of a generic religiosity. The bulk of the message sent by the military's presence at the NSJ is about the military's own public relations and recruitment interests. Even any implicit endorsement of the Boy Scouts would necessarily and primarily be understood to endorse the civic and patriotic aspects of the organization. Given the multiple attenuated steps between authorizing, though not requiring, support for the NSJ, finding implied support of the limited religious component of the Boy Scouts's principles, and any actual *effect* of promoting religion, such effect certainly would not be the *primary* effect of DOD's activities.

Second, the Supreme Court's most recent pronouncements on the Establishment Clause firmly establish that benefits "defined" by reference to religion are not *ipso facto* unconstitutional and must be viewed in context to assess the overall and realistic effect of government action relative to religion. The discussion in Part I, *supra*, amply demonstrates the importance of context and history. Even if such considerations are not viewed as superseding the effects portion of the *Lemon* test, they certainly must color its application. Thus it is quite telling that in both *Van Orden* and *Cutter*, the challenged conduct quite expressly defined its "benefits" by reference to religion – in one instance displaying the overtly religious Ten Commandments and in the other conferring enhanced rights on religious prisoners.

Accommodation cases such as *Cutter* are particularly noteworthy in that the benefits they confer – greater freedom for various religious practices notwithstanding laws, rules, or regulations that would prohibit comparable secular activities – are plainly directed *only* to religious beneficiaries yet still pass Establishment Clause muster. Such preferential accommodation, not required by the Free Exercise Clause, is necessarily a benefit that serves to promote or endorse religion to some extent, and might well provide an incentive either to

become religious or to practice one's religion to a greater extent. But the Court has repeatedly reaffirmed that "there is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements," notwithstanding that such accommodation favors religious over secular concerns. *Cutter*, 125 S. Ct. at 2117 (citations and internal quotation marks omitted). Such play in the joints likewise suggests that not every perceived sign of favor towards an organization promoting the free and diverse exercise of religion among its members is incompatible with the Establishment Clause.

C. Support for the NSJ at Best Results in *De Minimis* Promotion of Religiosity Not Rising to the Level of a Constitutional Violation.

At the end of the day, even if this Court were to accept the district court's reasoning at face value, the attenuated and indirect effect that § 2554 might have of promoting religion is nothing more than the "slightest deviation" from an overly rigid conception of neutrality. *Sherbert* v. *Verner,* 374 U.S. 398, 422 (1963) (Harlan, J., dissenting). As Justice Breyer recognized in *Van Orden*, "'[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have meaningful and practical impact.' * * * [W]here the Establishment Clause is at issue, we must 'distinguish between real threat and mere shadow.' * * * Here, we have only the shadow." 125 S. Ct. at 2871 (Breyer, J., concurring in the judgment) (citations omitted).

The overwhelmingly secular nature of the NSJ and the exclusively secular nature of DOD's involvement is unaccompanied by even the slightest "meaningful and practical impact" on religion. Even if the district court's narrow approach to *Lemon*'s effects test is accepted as the basis for finding indirect promotion of religion here, the effect is so minimal that to use it as

the basis for striking down § 2554 crosses from guarded separation into the improper hostility toward religion that the Constitution itself condemns.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of November, 2005, I caused two copies of the foregoing Brief for *Amicus Curiae* The American Legion to be served by Federal Express overnight delivery, postage pre-paid, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for *Amicus Curiae* The American Legion complies with the 7,000 word type-volume limitation of Fed. R. Civ. P. 29(d) & 32(a)(7)(B) in that it contains 6977 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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