No. 05-3451

In the United States Court of Appeals
for the Seventh Circuit

Eugene Winkler, *et al.*,

Plaintiffs-Appellees,

v.

Donald H. Rumsfeld,

Defendant-Appellant.

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

Brief for Appellant

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Statement of Jurisdiction

The complaint in this action alleges, among other things, that the Secretary of Defense's support of the Boy Scout Jamboree pursuant to 10 U.S.C. 2554 violates the Establishment Clause. The district court had jurisdiction pursuant to 28 U.S.C. 1331.

On June 22, 2005, the court issued a permanent injunction barring the Secretary of Defense from providing any aid to the Boy Scouts under 10 U.S.C. 2554, and a declaratory judgment holding the statute unconstitutional. *See* R. 209. The court issued final judgment on July 27, 2005, which noted that the court had resolved all the claims of all the parties. *See* R. 215. The Secretary

of Defense filed a timely notice of appeal from the above orders on August 18, 2005. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

Statement of the Issues Presented for Review

1. Whether plaintiffs lack Article III standing as federal taxpayers to challenge the Secretary's support of the Boy Scout Jamboree pursuant to 10 U.S.C. 2554.

2. Whether the Secretary's support of the Jamboree is consistent with the Establishment Clause.

Statement of the Case

The Boy Scout Jamboree occurs once every four years for a ten-day period. Since 1937, the military has supported the Jamboree by providing loans of military items and equipment, and by providing various services, such as logistical, medical, and military police services. In addition, since 1981, the Jamboree has been held at Fort A.P. Hill, a military training facility in rural Virginia. The military supports the Jamboree because it provides unique opportunities for recruitment and public relations efforts, for training of active-duty and reserve military personnel, and for construction and maintenance of facilities that are used during other times for military training. Congress provided express authority for this longstanding practice in 1972 by enacting 10 U.S.C. 2554.

For more than 90 years, the Boy Scouts of America has "successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people." *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1278 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993). The BSA has no theology and believes that the religious development of youth should be directed by their parents and spiritual advisors. To be a member of a Boy Scout troop, however, scouts are required to recite the Scout Oath and Law, which mention, among other things, a "duty to God" and a duty to be "reverent." Because of the Scout Oath and Law, and because 10 U.S.C. 2554 refers specifically and only to the Boy Scouts, the district court held that the Secretary's support of the Jamboree pursuant to that statute violates the Establishment Clause. In this appeal, the Secretary will argue that plaintiffs lack standing as federal taxpayers to challenge the Secretary's support of the Jamboree and that the Secretary's action is consistent with the Establishment Clause.

Statement of Facts

A. Facts

1. The Boy Scouts of America

The Boy Scout movement was founded in 1907 in England by Lord Robert Baden-Powell, a general in the British Army. After returning to his country a hero following military service in Africa, Baden-Powell wanted to use

his fame to help boys become better men. *See* Boy Scout Fact Sheet, Appellant's Separate Appendix ("Sep. App.") 88. He pioneered Boy Scouts, therefore, as a program of outdoor activities designed to develop skills in boys and give them a sense of enjoyment, fellowship, and a code of conduct for everyday living. Baden-Powell hosted the first Boy Scout camp and wrote the first Boy Scout handbook, which was adapted from a manual he had written for his army regiment on survival in the wild. Thousands of boys read it and joined the new organization. *See ibid.*

In 1910, after a meeting with Baden-Powell, William D. Boyce founded the Boy Scouts of America ("BSA") as a private, nonprofit organization. *See* Boy Scout Fact Sheet (Sep. App. 88). *See also* Declaration of Douglas S. Smith, ¶ 2 (Sep. App. 45-46). Immediately after its incorporation, officers of the YMCA assisted the BSA in organizing a task force to help community organizations start and maintain a high-quality Scouting program. Those efforts lead to the founding of the Nation's first Scout camp at Lake George, New York. *See* Boy Scout Fact Sheet (Sep. App. 88).

Six years later, in recognition of the BSA's dedication to community and public service, Congress granted the BSA a federal charter, which notes that the BSA's purpose is "to promote . . . the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values." 36 U.S.C. 30902. *See*

also S. Rep. No. 64-506, at 1-2 (1916) (noting that "[t]he Boy Scout movement . . . is intended to supplement and enlarge established modern educational facilities in activities in the great and healthful out of doors where may be the better developed physical strength and endurance, self-reliance, and the powers of initiative and resourcefulness, all for the purpose of establishing through the boys of to-day the very highest type of American citizenship"). Thus, the BSA, from its inception until today, has focused on citizenship training, community service, and outdoor activity and physical fitness. *See* Smith Decl., ¶ 5 (Sep. App. 46). Today, over three million youth and over one million adult volunteers participate in Scouting. *See id.* ¶ 3 (Sep. App. 46).

There are three Scouting programs: Cub Scouts, for 7-10 year old boys; Boy Scouts, for 11-17 year-old boys; and Venturing, for 14-20 year old boys and girls. *See* Smith Decl., ¶¶ 8, 11, 13 (Sep. App. 47-48). Youth membership in Scouting programs is open to any boy (or, in the Venturing program, for any boy or girl) who agrees to accept the Oaths or Promises that are applicable to the particular program. *See id.* ¶¶ 10, 12, 14 (Sep. App. 48). The Oaths or Promises are typically recited at troop meetings and other functions. *See id.* ¶ 15 (Sep. App. 49). The Boy Scout Oath provides as follows: "On my honor I will do my best To do my duty to God and my Country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." *See id.* ¶ 6 (Sep. App. 47). The Scout

Law provides that a scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent." *Ibid.* With respect to the "Reverence" aspect of Scout Law, the BSA's guiding principles explain that a Scout "is Reverent toward God. He is faithful in his religious duties. He respects the beliefs of others." Boy Scout Fact Sheet (Sep. App. 89).

The BSA does not define what constitutes duty to God or the practice of religion. Likewise, the BSA has no theology and does not engage in religious instruction itself, but instead merely encourages members to practice their religious beliefs as directed by their family and spiritual advisors. *See* Smith Decl., ¶¶ 26, 28 (Sep. App. 52-53). For example, scouts may choose, in order to achieve certain ranks or emblems, to demonstrate that they have made efforts to explore their faith under the direction of their families and spiritual advisors. *See id.* at 29-31 (Sep. App. 53-55).

The BSA welcomes young people of every religious denomination as well as those who affiliate with no organized religion whatsoever. *See* Smith Decl., ¶ 26 (Sep. App. 52). Thus, the BSA "does not require its members to attend or participate in any sectarian religious ceremony." *Id.* ¶ 28 (Sep. App. 53). One must accept the Boy Scout Oath, however, in order to be a Scout or leader.

See id. ¶ 20 (Sep. App. 50). Thus, atheists and agnostics are ineligible for membership or leadership positions in Scouting. *See id.* ¶ 24 (Sep. App. 51).[1]

2. The Boy Scout Jamboree

a. Beginning in 1937, the Boy Scouts have held fifteen National Scout Jamborees for Scouts and leaders of Boy Scout councils at various national and state parks or land reserves. *See* Declaration of Edmond L. Irizarry, ¶ 7 (Sep. App. 68). "The programs, activities, and attractions at the Jamboree focus on the primary activities of Boy Scouting: physical fitness, conservation, ecology, and the universal spirit of brotherhood." Smith Decl., ¶ 45 (Sep. App. 59). For example, the 2001 Jamboree included "four Action centers, which offered Jamboree participants activities such as archery, air-rifle shooting, motocross, buckskin games, rappelling, and trapshooting." *Ibid.* "Outback centers allowed Scouts to experience the latest developments in conservation and to participate in fishing, scuba diving, snorkeling, canoeing, kayaking, rafting, and sailing." *Ibid.* Other activities included the Arts and Science Expo, recreations of an American Indian village, and the Disabilities Awareness Trail. *Id.* ¶ 47 (Sep. App. 59).

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[1] There is no membership or leadership requirement, however, in order to visit a Boy Scout Jamboree. *See* Supplemental Declaration of Douglas S. Smith, Jr., ¶ 24 (Sep. App. 37). Thus, tens of thousands of visitors from the general public attend the Jamboree. *See* Irizarry Decl. ¶ 17 (Sep. App. 72).

Since the first National Scout Jamboree in 1937, the military has assisted with the event by loaning equipment, such as camping, messing, refrigeration, and medical equipment; by providing auxiliary services, such as logistical, medical, and military police personnel; and by supplying ceremonial services, such as military bands and color guards. *See* Irizarry Decl., ¶ 8 (Sep. App. 69). In addition, since 1981, Fort A.P. Hill, a U.S. Army Installation near Bowling Green, Virginia, has served as the permanent site of the National Scout Jamboree. *See id.*, ¶ 9 (Sep. App. 69). Fort A.P. Hill, which covers 75,944 acres, is used for training by more than 150,000 active, National Guard, and U.S. Army Reserve soldiers annually. Parts of the base also are open to the public for outdoor recreation purposes, such as hunting, fishing, and camping. *See ibid.*

The Boy Scouts use approximately 3000 acres of land at Fort A.P. Hill during the National Scout Jamboree to support a virtual city of more than 40,000 Scouts and leaders. *See* Irizarry Decl., ¶ 10 (Sep. App. 69). The area where the National Scout Jamboree is held is used for regular military training the remainder of the time. *See ibid.* Over the past three years, that area has been used for over 100,000 man-days of non-Jamboree related training per year. *See ibid.* (Sep. App. 69-70).

b1. In recognition of the military's long tradition of supporting the Boy Scout Jamboree, Congress in 1972 provided permanent authority for such

support by enacting 10 U.S.C. 2554. *See* S. Rep. No. 92-631 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2022, 2023-24. As originally enacted, 10 U.S.C. 2554 authorized the Secretary of Defense to "lend to the [BSA], for the use and accommodation of Scouts, Scouters, and officials who may attend any national or world Boy Scout Jamboree, such cots, blankets, commissary equipment, flags, refrigerators, and other equipment without reimbursement, furnish services and expendable medical supplies, as may be necessary or useful to the extent that items are in stock and items or services are available." 10 U.S.C. 2554(a).[2] In 1996, Congress amended this statute to add that "[i]n the case of a Boy Scout Jamboree held on a military installation, the Secretary of Defense may provide personnel services and logistical support at the military installation" in addition to the support otherwise authorized under the statute. 10 U.S.C. 2554(g).

While the Jamboree statute (10 U.S.C. 2554) provided specific, express authority for military support of the Jamboree, the military's longstanding support of the Jamboree also is authorized by other statutes and regulations. For example, 10 U.S.C. 2667 authorizes the military to lease real or personal

[2] 10 U.S.C. 2554 also authorizes the Secretary to provide, without expense to the U.S. Government, transportation for Boy Scouts and the equipment and property of Boy Scouts in connection with Boy Scout Jamborees. *See* 10 U.S.C. 2554(d). This authority has not been recently used, however, because of cost prohibitions and the availability of less expensive commercial sources of travel. *See* Irizarry Decl., ¶ 3 n.1 (Sep. App. 67).

military property to private groups where such an arrangement would "promote the national defense or be in the public interest," 10 U.S.C. 2667(a), and to accept whatever value the military determines would be in the public interest. *See id.* 2667(f)(2). Likewise, 10 U.S.C. 2012(a) authorizes the Secretary of Defense to allow "units or individual members of the armed forces . . . to provide support and services to [specified] non-[DOD] organizations and activities," if "the provision of such assistance is incidental to military training." 10 U.S.C. 2012(a). This statute authorizes assistance to be provided to any federal, regional, state, or local government entity; thirteen specific youth or charitable organizations, including the Boy Scouts; and "[a]ny other entity . . . approved by the Secretary of Defense on a case-by-case basis." Id. 2012(e). *See also* Joint Ethics Regulation, DOD 5500.7, § 30211 (copy provided as addendum) (authorizing use of DOD facilities and equipment and the services of DOD employees to support events sponsored by a non-federal entity where, *inter alia*, DOD community relations or training interests would be served).

Pursuant to this authority, the military provides support services for numerous special events held by private non-military organizations, including the Special Olympics, the Goodwill Games, and other major sporting events; Presidential inaugurations and national political conventions; and conventions of national military associations. *See* Irizarry Decl., ¶ 2 (Sep. App. 66). *See also* 10 U.S.C. 2555 (authorizing the Secretary of Defense to provide

transportation to the Girl Scouts). The military also routinely opens its military bases and other property for appropriate use by civic organizations, under authority delegated to individual base commanders. *See* 10 U.S.C. 2012(e) (providing statutory authority for such aid). For example, as we have mentioned, parts of Fort A.P. Hill itself are open to the general public for outdoor recreation purposes, such as hunting, fishing, and camping. *See* p. 8, *supra*, *citing* Irizarry Decl., ¶ 9 (Sep. App. 69). *See also* Declaration of Kevin Bushey, ¶ 13 (Sep. App. 83) (on average, the military provides support under section 2012 for 100 events or projects per year).

b2. Military support of the Jamboree falls into several categories: (a) loaned equipment, including tents, blankets, tables, refrigeration devices, motor vehicles, and communications equipment; (b) auxiliary support services, including security, medical, communications, logistical, and other auxiliary support services; (c)public relations/ceremonial support, including performances by military bands, drill teams, and other performing units during the Jamboree, as well as exhibits, displays, and souvenirs promoting the armed services; and (d) infrastructure, safety, and other improvements to Fort A.P. Hill, such as maintenance work on water and sewer systems, the paving of roads, and the construction of shower and latrine facilities. *See* Irizarry Decl., ¶ 12 (Sep. App. 70-71).

The costs to the Department of Defense of providing support to the Jamboree vary from year to year. For the 2001 Jamboree, the Army budgeted and spent approximately $8 million in Operations and Maintenance over four years. *See* Irizarry Decl., ¶ 13 (Sep. App. 71). These funds were used to pay not only for services provided in support of the event itself, but also for the costs of transporting and billeting the population of soldiers brought to Fort A.P. Hill to perform services during the event. *See ibid.* No Department of Defense funds spent in support of the Jamboree are provided directly to the BSA, however. All support provided by the Department to the Jamboree takes the form of in-kind support as described above. *See id.* ¶ 14 (Sep. App. 71).

c. Pursuant to Department of Defense ("DOD") policy, any and all funds spent in support of the National Scout Jamboree must have a military benefit, and no funds may be spent on commercial items or services that solely benefit the Boy Scouts. *See* Irizarry Decl., ¶ 15 (Sep. App. 72). The Department of Defense has determined that supporting the Boy Scout Jamboree benefits the Department in several important ways.

i. The Jamboree is an important public relations event for the Department. Tens of thousands of Scouts attend as well as many tens of thousands more visitors from the general public, and national leaders, including members of Congress and the President of the United States,

frequently address Scout audiences at the Jamboree. The event attracts substantial media attention, and therefore gives the Department the opportunity "to promote a positive image of the military to the many people in attendance" and to those who become aware of the event through media coverage. Irizarry Decl., ¶ 17 (Sep. App. 72).

The Jamboree also provides an outstanding opportunity for the Department of Defense to promote the military as a future career path to thousands of Boy Scouts present at the event. *See* Irizarry Decl., ¶ 18 (Sep. App. 72-73). The Department considers young men with Scouting backgrounds to be "an outstanding source of high-caliber officers, soldiers, sailors, airmen, and marines." *Ibid.* "The values instilled by the BSA (*e.g.* patriotism, courage, self-reliance, community service, leadership, teamwork, the spirit of brotherhood, physical fitness, love of the outdoors, etc.) significantly overlap with those espoused by our military services." *Ibid.* Thus, for example, "[s]ince the Boy Scouts' inception, a large percentage of those who have participated in the Boy Scouts program have gone on to serve in the military, including many distinguished, high-ranking officers. *Ibid.*

Consequently, the Jamboree "provides an ideal venue for [the Department] to showcase its military services." Irizarry Decl., ¶ 19 (Sep. App. 73). While the Department does not actively recruit Boy Scouts during the Jamboree, "it does pursue the recruitment-related objective of promoting the

military to a large gathering of America's youth and showcasing the exciting careers that the military offers." *Ibid.* The Department achieves this objective through entertainment provided by military performing units; exhibits, displays, and activity areas; and direct interaction between military personnel and Boy Scouts. *See* Irizarry Decl., ¶ 19 (Sep. App. 73-74).

For example, during the 2001 Jamboree, twenty-four performing units from all the Services provided daily entertainment, including marching bands, drill teams, color guards, stage shows, and flyovers. *See* Irizarry Decl., ¶ 19(a) (Sep. App. 73). At the 1997 and 2001 Jamborees, the Army also operated an "Army Adventure Area" that consisted of displays of modern military equipment (*e.g.*, an M1-A1 Abrams tank and an Apache helicopter); interactive exhibits (*e.g.*, crossing a rope bridge, trying on a parachute, using an artillery simulator); and displays from U.S. Army Recruiting Command, the United States Military Academy, Reserve Officer Training Corps, and the Army National Guard. *See id.* ¶ 19(a) & (b) (Sep. App. 73-74). Scouts who visited the Adventure Area also could take away souvenir items, such as military unit patches or other items bearing Army logos. *See id.* ¶ 19(b) (Sep. App. 73).

The Department of Defense's public relations/recruiting mission is a major part of its overall mission at the Jamboree. At the 2001 Jamboree, for example, roughly one-half of the soldiers, sailors, airmen, and marines present on Fort A.P. Hill belonged to performing units or otherwise assisted with the

above-described public relations/recruiting activities. *See* Irizarry Decl., ¶ 20 (Sep. App. 74).

ii. The Jamboree also provides important training opportunities for military personnel. Jamborees require the construction, maintenance, and disassembly of a "tent city" capable of supporting tens of thousands of Boy Scouts and many tens of thousands more visitors for over a week. Overseeing and carrying out a logistical operation of this size provides opportunities for military training, and military units and personnel assigned to the Jamboree are given tasks and responsibilities directly related to their unit mission and that are designed to exercise their respective mission skill sets. *See* Irizarry Decl., ¶ 21 (Sep. App. 74-75). Examples of such assignments include "installation and operation of telephone and wireless communications systems by signal personnel; provision of hospitalization, first aid, preventive medical services, and ground/air evacuation by medical personnel; transportation of staff, vehicles, and equipment, assistance with media activities, and paradrop operations by aviation personnel; extensive coordination and planning by logistics and procurement personnel; media and community relations operations by public affairs personnel; and terrorism threat assessments and attack preparations by chemical/biological response personnel." *Ibid*.

iii. Finally, the Department of Defense uses the Jamboree "to make various 'dual-use' improvements to Fort A.P. Hill that, while benefitting the

BSA, also provide a lasting military benefit to the installation," including improvements that are later used directly in military training exercises. Irizarry Decl., ¶ 23 (Sep. App. 75-76). For example, during the 1997 Jamboree, the Army constructed four obstacle courses, using materials provided by the Boy Scouts. The Boy Scouts used the obstacle courses during the Jamboree, but the courses were designed to meet military training specifications and were used thereafter by soldiers at Fort A.P. Hill. *See ibid.* "Other improvements – such as the construction of access roads, replacement of wells and sewer lines, erection of shower and latrine facilities, or expansion of a tent repair facility – promote the training mission of the installation by generally expanding the capacity of the installation to house and train soldiers." *Ibid.* "Relatedly, the infrastructure improvements also expand the surge capacity of the installation, which allows the installation to billet large numbers of soldiers when needed in response to emergency events in the region." *Ibid.* (noting that "[r]ecent examples of such use of the installation include the response to the September 11 attack on the Pentagon and Hurricane Isabel relief efforts").

"Other examples of dual-use improvements concern health and safety measures taken in preparation for the [Jamboree]." Irizarry Decl., ¶ 24 (Sep. App. 76). "For example, water-quality testing is done in advance of the [Jamboree] at the installation's ponds, lakes, and streams for water-borne pathogens." *Ibid.* "The results are not only used in the planning for the

[Jamboree] but are also used in the risk analyses conducted by local unit commanders when they plan military training exercises at Fort A.P. Hill." *Ibid.*

A number of the capital improvements made to Fort A.P. Hill in anticipation of the Jamboree have been paid for in whole or in part by the BSA. Indeed, since the Jamboree first began being held at Fort A.P. Hill in 1981, the BSA has invested an estimated $5.6 million in improvements to the installation. *See* Irizarry Decl., ¶ 25 (Sep. App. 77). The Boy Scouts made these improvements pursuant to the terms of an agreement with the Department of the Army whereby the BSA and the Army signed a 20-year letter of understanding. Pursuant to that letter, the Boy Scouts agreed to make permanent improvements at Fort A.P. Hill and to allow the military to use those facilities except during the Jamboree, in exchange for priority to facilities at Fort A.P. Hill for ten days every four years. *See* DOD 002085 (Sep. App. 41)

B. Procedural History

Plaintiffs, five Illinois residents, filed this suit in federal district court as an Illinois state-wide class action against the Chicago Public Schools, and as a nationwide class action against the United States Transportation Command and other federal agencies, alleging that defendants' support of Boy Scout youth activity programs violates the Establishment Clause. *See* Complaint, R. 1. Plaintiffs later substituted the Chicago Reform Board of Trustees for defendant Chicago Public Schools regarding count one their complaint, *see*

Amended Complaint, R. 5, and eventually settled all their claims against the state and local defendants. Plaintiffs also dismissed their claim against the U.S. Transportation Command. *See* R. 48.

Plaintiffs subsequently filed two amended complaints against the Secretary of Defense and the Secretary of Housing an Urban Development ("HUD"). *See* R. 48, 140. Those Complaints challenged four statutes by which the Secretary of Defense supports the Boy Scouts, and two HUD programs that support the Scouts. *See* Third Amended Complaint, ¶¶ 88-126 (Sep. App. 19-26).[3]

The district court granted summary judgment for the Secretary of HUD regarding both of the HUD programs plaintiffs challenged. *See* March 16, 2005 Opinion at 53, Appellant's Short App. ("App.") 53. The court also granted summary judgment for the Secretary of Defense regarding one of the four Department of Defense statutes plaintiffs challenged, 10 U.S.C. 2606. *See ibid*. In the ruling currently on appeal, however, the court granted summary judgment for plaintiffs with respect to their challenge to 10 U.S.C. 2554 (the "Jamboree statute").

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[3] Plaintiffs also asserted Establishment Clause claims against the Department of Defense itself and the Department of HUD, but the district court dismissed those claims because those agencies are not proper parties. *See* R. 110.

Relying on *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Secretary argued that plaintiffs lack taxpayer standing to challenge 10 U.S.C. 2554 because it is authorized by Constitution's Property Clause, Art. IV, § 3, cl. 2, and Military Clauses, Art. I, § 8, cls. 12-14. *See* Opinion at 17 (App. 17). The court rejected that argument, however, because it concluded that 10 U.S.C. 2554 also is authorized by the Taxing and Spending Clause, and that such authorization is sufficient to support federal taxpayer standing under *Flast* v. *Cohen*, 392 U.S.83 (1968).

With respect to the merits, the district court held that the Jamboree statute is unconstitutional because it has the primary effect of advancing religion. The court began by concluding that the BSA is a religious organization because the Boy Scouts "exclude atheists and agnostics from its youth membership and adult leadership." *See* Opinion at 37 (App. 37). Based on that conclusion, the court then held that the statute "defines recipients by reference to religion," because the aid it provides "is not available to both religious and secular beneficiaries; rather, the only beneficiary is the BSA." Opinion at 38 (App. 38). The statute also gives rise to government indoctrination of religion, the court held, because "the aid 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 BSA Jamboree to the exclusion of other possible recipients." *Id.* at 39 (App. 39).

The district court entered declaratory and injunctive relief pertaining to the Jamboree statute by order of June 22, 2005. *See* App. 54. That Order declares that 10 U.S.C. 2554 violates the Establishment Clause, and enjoins the Secretary of Defense "from providing any aid to the Boy Scouts of America pursuant to 10 U.S.C. 2554, with the sole exception of aid provided or to be provided in support of the 2005 Jamboree." Order at 7 (App. 60).

The June 22, 2005 Order also granted summary judgment for the Secretary with respect to two of the other statutes plaintiffs had challenged: 10 U.S.C. 2012 and 32 U.S.C. 508. *See* Order at 5 (App. 58). Since the plaintiffs had previously settled their claims against the state and local defendants, the June 22 Order effectively resolved all the claims of all the parties. The parties so advised the court, *see* R. 213, and the court entered final judgment on July 27, 2005. On August 18, 2005, Secretary Rumsfeld filed a timely notice of appeal from the order granting summary judgment regarding the Jamboree statute, the order issuing injunctive relief regarding that statute, and the final judgment. Sep. App. 90.

Summary of Argument

1. Plaintiffs' status as federal taxpayers does not provide them with Article III standing to challenge the Department of Defense's support of the Boy Scout Jamboree pursuant to 10 U.S.C. 2554. Plaintiffs lack taxpayer standing because 10 U.S.C. 2554 is within Congress's authority under the Constitution's Property and Military Clauses. The Supreme Court has never recognized taxpayer standing where Congress has constitutional authority independent of the Taxing and Spending Clause. Moreover, in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Court refused to recognize taxpayer standing where, as here, Congress's action was justified by the Constitution's Property Clause. To hold that plaintiffs have taxpayer standing to challenge 10 U.S.C. 2554 would extend that doctrine far beyond where the Supreme Court has applied it, and would greatly expand the reach of what the Court designed to be a limited exception to the general rule that taxpayer status does not confer Article III standing.

Plaintiffs also lack federal taxpayer standing to challenge 10 U.S.C. 2554 because that statute does not implement a taxing and spending program within the meaning of *Flast* v. *Cohen*, 392 U.S. 83 (1968), which created the limited taxpayer standing exception on which plaintiffs rely. Section 2554, unlike the statutes at issue in *Flast* and in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), does not involve the disbursement of federal funds to a grantee.

Rather, the statute merely addresses the military's regulation of its own property and manpower. Under the terms of *Flast* itself, therefore, taxpayer standing is not available here. *See Flast*, 392 U.S. at 102 (federal taxpayer standing does not exist where the plaintiff merely alleges "an incidental expenditure of tax funds in the administration of an essentially regulatory statute").

Finally, plaintiffs lack standing to challenge 10 U.S.C. 2554 because their claims are not redressable. Pursuant to other statutes and regulations, which are not the subject of this appeal, the military has consistently provided support for the Boy Scout Jamboree since 1937, long before Congress enacted section 2554. *See*, *e.g.*, 10 U.S.C. 2667 (providing authority to lease military property); 10 U.S.C. 2012 (providing authority to support private organizations if doing so would further the military mission). Thus, the military would have authority to continue supporting the Jamboree even if section 2554 were unconstitutional, which it is not.

2. Plaintiffs' Establishment Clause challenge to 10 U.S.C. 2554 also fails on the merits. The military has consistently chosen to provide support for the Jamboree since 1937 because the Jamboree provides unique and compelling benefits to the military. The Jamboree is an important public relations event for the military, as well as a unique opportunity for the military to promote the military as a future career path to a large group of young people

who are an outstanding potential source of high-quality officers and soldiers. The Jamboree also provides unique training opportunities for military personnel, who are given tasks and responsibilities (such as providing medical services, logistical planning, and wireless communication services) that are directly related to their unit mission. Finally, the military uses the Jamboree as an opportunity to make improvements to the facilities at Fort A.P. Hill that are later used in military training exercises.

These benefits easily satisfy the Establishment Clause's requirement of a secular purpose for 10 U.S.C. 2554, and plaintiffs do not argue to the contrary. The same evidence also shows that the military's support of the Jamboree pursuant to section 2554 satisfies the Establishment Clause's requirement that the government be neutral toward religion, since that support is based on "criteria that neither favor nor disfavor religion," *Agostini* v. *Felton*, 521 U.S. 203, 232 (1997).

That 10 U.S.C. 2554 refers specifically to the Jamboree does not render the military's support of the Jamboree an act of religious favoritism. Section 2554 does not preclude the military from providing support for events sponsored by other private groups, and the military supports a myriad of such activities, including, but not limited to, the Special Olympics, the Goodwill Games, and other major sporting events; Presidential inaugurations and national political conventions; and conventions of national military

associations. *See* 10 U.S.C. 2667 (authorizing military to lease military property to private groups); 10 U.S.C. 2012 (authorizing military to support private events where such support will advance the military mission). All section 2554 does is provide additional authority for the support of one such event, because of the longstanding nature of the military's support of the Jamboree and the unique military benefits the Jamboree continues to provide. That is not favoritism toward religion.

Indeed, for several reasons, this is not the kind of case that should raise Establishment Clause concerns at all. The BSA has no theology and does not require scouts to engage in any religious activity. The Scout Oath and Law refer to a scout's "duty to God" and to the importance of being "reverent," but the BSA leaves it to the individual scout to define what these terms mean to him or her. Scouting focuses on citizenship training, community service, and outdoor activity and physical fitness, and the Boy Scout Jamboree predominantly provides scouts with the opportunity to engage in precisely these kinds of secular activities.

Moreover, the military's provision of support to the Jamboree under 10 U.S.C. 2554 is far-removed from the kinds of "aid" the Supreme Court has held can raise Establishment Clause concerns. The Supreme Court has long held that the government may enter into contracts and other such arrangements with religious institutions for the provision of secular services. *See*, *e.g.*,

Bradfield v. *Roberts*, 175 U.S. 291 (1899) (upholding a federal grant to a religious hospital to erect a building to be used for treating people with contagious diseases). No more is going on here, even if the BSA could be considered a religious entity. The military's support of the Jamboree pursuant to 10 U.S.C. 2554 is the result of an arms-length transaction in which the military allows the BSA to use a part of one military base for ten days once every four years, in exchange for the many significant military benefits the Jamboree provides, as well as the BSA's own contribution of millions of dollars worth of dual-use improvements to Fort A.P. Hill. This is not unconstitutional advancing of religion in any sense recognized in the Supreme Court's case law, or, indeed, in any sense at all. For all the above reasons, therefore, this Court should vacate the injunction barring the Secretary from supporting the Jamboree pursuant to 10 U.S.C. 2554, and reverse the order granting judgment to plaintiffs regarding that claim.

Statement of the Standard of Review

This appeal raises legal issues, which are reviewable *de novo*. *See Plotkin* v. *Ryan*, 239 F.3d 882, 884 (7th Cir. 2001).

Argument

I. Plaintiffs Lack Taxpayer Standing to Challenge 10 U.S.C. 2554.

The district court erred by holding that plaintiffs have standing as federal taxpayers to challenge the Secretary's support of the Boy Scout Jamboree

pursuant to 10 U.S.C. 2554. Federal taxpayer standing does not exist where congressional action can be justified by a provision of the Constitution separate and apart from the Taxing and Spending Clause. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). 10 U.S.C. 2554, as we explain below, is within Congress's authority under the Constitution's Property Clause and Military Clauses.

Plaintiffs also lack federal taxpayer standing to challenge 10 U.S.C. 2554 because that statute does not implement the kind of taxing and spending program at issue in *Flast* v. *Cohen*, 392 U.S. 83 (1968), which announced the taxpayer standing doctrine upon which plaintiffs rely. Unlike the statute at issue in *Flast*, 10 U.S.C. 2554 does not authorize the disbursement of federal funds to grantees, but merely regulates the military's own control of its property, resources, and employee time.

Finally, plaintiffs lack Article III standing to challenge 10 U.S.C. 2554 because their claims are not redressable. The Secretary has authority to support the Jamboree under other statutes and regulations, which are not at issue in this appeal.

A. The Doctrine of Federal Taxpayer Standing.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), the Supreme Court held that a taxpayer's relation to the federal government is too remote to justify Article III standing. A federal taxpayer's interest in the moneys of the treasury,

the Court explained, "is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.* at 487. Injury based on federal taxpayer status also is insufficiently discrete, the Court held in *Frothingham*, to render a taxpayer an appropriate party to invoke federal jurisdiction. "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.* at 487.

Frothingham also held that to allow federal taxpayers to challenge congressional appropriations based on their taxpayer status would violate separation of powers principles. As the Court explained, to allow a federal taxpayer to challenge congressional action based on nothing more than his or her taxpayer status "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." 262 U.S. at 489.

The Supreme Court revisited the issue of federal taxpayer standing in *Flast* v. *Cohen*, 392 U.S. 83 (1968). *Flast* was an Establishment Clause

challenge to the expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. The Court observed that "it is both appropriate and necessary to look to the substantive issues" to "determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. "Such inquiries into the nexus between the status asserted by the litigant and the claim he presents," the Court stated, "are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Ibid.*

Flast held that "[t]he nexus demanded of federal taxpayers has two aspects to it." 392 U.S. at 102. "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked." *Ibid.* "Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Ibid.* "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Ibid.* "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. "Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply

that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Ibid.*

The Court held that the taxpayers in *Flast* satisfied both elements of this test. "Their constitutional challenge," the Court noted, "is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of tax funds." 392 U.S. at 103. Moreover, there was a nexus between their taxpayer status and their Establishment Clause challenge to the taxing and spending program at issue, since that Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.

In *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Supreme Court emphasized the limited nature of *Flast*'s exception to the general rule against federal taxpayer standing, and clarified that exception in one respect that is particularly significant here. In *Valley Forge*, the Supreme Court held that plaintiffs lacked federal taxpayer standing to challenge an agency's transfer of surplus military property to a religious college. The plaintiffs could not satisfy the first prong of the *Flast* test, the Court held, because "authorizing legislation [for the property transfer] was an evident exercise of Congress' power under the

Property Clause, Art. IV, §, cl.2," not the Taxing and Spending Clause. *Id.* at 480.

B. Plaintiffs Lack Taxpayer Standing to Challenge the Jamboree Statute.

1. The Challenged Government Action is Supported by Constitutional Authority Separate and Apart From the Taxing and Spending Clause.

a. In light of *Valley Forge*, a majority of the federal courts to have addressed the question have held that if a source of constitutional authority other than the Taxing and Spending Clause supports governmental action challenged under the Establishment Clause, a plaintiff may not assert federal taxpayer standing under *Flast* to challenge that action. *See*, *e.g.*, *Americans United for Separation of Church and State* v. *Reagan*, 786 F.2d 194, 199 (3d Cir. 1986), *cert. denied*, 479 U.S. 914 (1986); *Phelps* v. *Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987); *Shaffer* v. *Clinton*, 54 F. Supp. 2d 1014, 1017 (D. Col. 1999), *aff'd on other grounds*, 240 F.3d 878 (10th Cir.), *cert. denied*, 534 U.S. 992 (2001); *Richardson* v. *Kennedy*, 313 F. Supp. 1282, 1286 (W.D. Pa. 1970) (three-judge panel), *aff'd mem.*, 401 U.S. 901 (1971).

The district court rejected this line of cases, noting that it "had not located any express restriction in *Flast*[]that Congress need to have been acting *only* pursuant to the Taxing and Spending Clause in order for [federal taxpayer] standing to exist." Opinion at 15 (App. 15). The district court distinguished *Valley Forge* on the ground that "Congress could not have been acting

pursuant to the taxing and spending clause" in that case, since the government action at issue there concerned the transfer of military property to a private religious college. Opinion at 15-16 (App. 15-16).

Nothing in *Flast* or *Valley Forge*, however, suggests that a taxpayer may challenge government action that is supported by a provision of the Constitution other than the Taxing and Spending Clause, and the Supreme Court has never recognized federal taxpayer standing in such a case. *Flast* itself, for example, involved a classic spending program, involving the disbursement of federal funds to grantees, for which there was no other apparent source of constitutional authority. *See Flast*, 392 U.S. at 85-87.[4] The same also is true of *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the only other case in which the Supreme Court has found federal taxpayer standing to exist. *See id.* at 619-620 (noting that the Adolescent Family Life Act "is at heart a program of disbursement of funds pursuant to Congress's taxing and spending powers"). Moreover, in addition to *Valley Forge*, the Supreme Court has twice refused to extend *Flast* to government action that had a basis of constitutional authority other than the Taxing and Spending Clause. *See Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (plaintiffs lacked

[4] *Flast* involved challenges to Titles I and II of the Elementary and Secondary Education Act of 1965, which authorized the disbursement of federal funds to the states for the support of special education services and printed instructional materials for distribution to private schools, including private religious schools. *See* 392 U.S. at 85-87.

federal taxpayer standing to challenge decision of certain members of Congress to retain their membership in Armed Forces Reserves while they held office); *United States* v. *Richardson*, 418 U.S. 166, 175 (1974) (plaintiff lacked federal taxpayer standing to compel Secretary of Treasury to publish an accounting of receipts and expenditures of the CIA).

The Supreme Court's refusal to extend *Flast* beyond challenges to laws that are authorized only by the Taxing and Spending Clause makes sense. This understanding of *Flast*, for example, reflects that case's own admonition that federal taxpayer standing exists "*only* [with respect to] exercises of congressional power under the taxing and spending clause." 392 U.S. at 102 (emphasis added). Indeed, *Flast* expressly disavowed any intent to recognize taxpayer standing based solely on the fact that authority for government action can be located in the Taxing and Spending Clause. *See Flast*, 392 U.S. at 102 (noting that taxpayer standing does not exist where the plaintiff merely alleges "an incidental expenditure of tax funds in the administration of an essentially regulatory statute"). *See also Bowen* v. *Kendrick*, 487 U.S. at 618 (noting the "narrow exception [*Flast*] created to the general rule against taxpayer standing established in *Frothingham*"); *Valley Forge*, 454 U.S. at 481 (noting the "rigor" with which the *Flast* exception to the *Frothingham* principle was applied in *Schlesinger* and *Richardson*); *Richardson*, 418 U.S. at 173 (noting the "narrowness" of the taxpayer standing rule announced in *Flast* and that *Flast*

"must be read with reference to its principal predecessor, *Frothingham* v. *Mellon*").

Moreover, this reading of *Flast* helps ensure that the taxpayer standing doctrine will not become a roving source of authority for plaintiffs who lack traditional Article III standing to bring Establishment Clause challenges to any and all federal action. Congress's power to authorize expenditure of public moneys for public purposes extends beyond the direct grants of legislative power found in the Constitution. *See United States* v. *Butler*, 297 U.S. 1, 66 (1936). The district court plainly erred in holding that federal taxpayer standing exists wherever a plaintiff can show that the Taxing and Spending Clause provides authority for the government action challenged.

b. All of the support provided by the Secretary of Defense to the Boy Scout Jamboree is authorized by constitutional provisions separate and distinct from the Taxing and Spending Clause. The Secretary's decision to allow the BSA to hold the Jamboree at Fort A.P. Hill, for example, is authorized by the Property Clause. *See* U.S. Const., Art. IV, § 3, cl. 2.[5] That much follows directly from *Valley Forge*, which, as we have explained, held that the Property Clause provided constitutional authority for the transfer of military property to a private religious college.

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[5] The Property Clause provides as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2.

The Property Clause also provides authority for the Secretary's decision to lend various items of personal property (such as tents, blankets, and tables) to the BSA in connection with the Boy Scout Jamboree. The property that was transferred to the religious college in *Valley Forge*, for example, included not only a 77-acre tract of land, but also buildings and fixtures, *see* 454 U.S. at 468 & n.7, as well as surplus personal property. *See* Brief for Respondent, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 1981 WL 390382 *8. The Supreme Court considered it "evident" that the transfer of that property was authorized by the Property Clause. 454 U.S. at 480.[6]

The services the Secretary of Defense provides to the BSA in connection with the Boy Scout Jamboree are authorized by the Constitution's Military Clauses, which provide that Congress shall have power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval forces." U.S. Const., Art. I, § 8, cls. 12-14. The power to provide and maintain military forces obviously includes the authority to regulate the activities of those service members, as

[6] The fact that the chapter in which Section 2554 appears is denominated "Issue of Supplies, Services, and Facilities," 10 U.S.C., ch. 152, also confirms that the section is concerned with property management. Furthermore, the fact that the military provided similar services and equipment to Boy Scout Jamborees for more than three decades under other statutes that regulate the use of military property by non-military entities underscores that Section 2554 is simply a codification of a longstanding property management practice by the military.

well as the authority to engage in whatever spending is necessary to support those activities. Thus, the military's assignment of military personnel to provide support services for the Jamboree falls directly within the authority granted by the Constitution's Military Clauses. Moreover, as we have explained, the military receives numerous benefits from supporting the Jamboree, including training opportunities for military personnel; public relations and recruitment opportunities; and the construction of facilities, structures, and roads that are used primarily for military purposes. The existence of those benefits confirms that the Military Clauses authorize the Secretary's longstanding support of the Boy Scout Jamboree.

The district court questioned whether the Military Clauses support 10 U.S.C. 2554 because the statute allows federal agencies other than the Department of Defense to assist with the Jamboree. *See* Opinion at 17-18 (App. 17-18). The fact that section 2554 authorizes non-military agencies to support the Jamboree does not, however, mean that such support cannot provide important benefits to the military. For example, pursuant to the Stafford Act, 42 U.S.C. 5121, the Department of Defense can receive support from other agencies in response to a disaster that occurs on or surrounding a military installation, agency, or activity. The Department of Defense also receives numerous other forms of support from the other federal agencies pursuant to the Economy Act, 31 U.S.C. 1535, which authorizes federal

agencies to obtain items or services from other federal agencies. Thus, the fact that section 2554 authorizes other federal agencies to assist with the Jamboree does not mean that the military's own support of the Jamboree is not authorized by the Constitution's Military Clauses.

The district court also noted that the Taxing and Spending Clause itself "states that one of the purposes for such taxing and spending will be for the 'common Defence.'" Opinion at 18 (App. 18) (citation omitted). "Thus," the district court reasoned, "in enacting the Jamboree statute Congress could have been acting pursuant to the taxing and spending clause and not the military clauses." *Ibid.* As we have explained, however, plaintiffs lack taxpayer standing under *Flast* even if the military's support of the Jamboree is authorized by the Taxing and Spending Clause as well as the Property and Military Clauses.

Finally, the district court questioned whether the Property and Military Clauses provide constitutional authority for 10 U.S.C. 2554 because neither the statute nor its legislative history expressly refers to recruiting or training purposes. It is settled law, however, that "Congress need not expressly invoke a specific constitutional provision to act pursuant to it," *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997). *See also United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (noting that the Supreme Court "has never

insisted that a legislative body articulate its reasons for enacting a statute"); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 145 (1948) ("The question of constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

For all the above reasons, therefore, the Court should hold that plaintiffs lack taxpayer standing under *Flast* to challenge the military's support of the Jamboree pursuant to 10 U.S.C. 2554 because the Property and Military Clauses provide constitutional authority for that statute.

2. The Challenged Government Action Does Not Involve a Taxing and Spending Program as in *Flast*.

As we have already noted, the Supreme Court has recognized federal taxpayer standing only in two cases, both of which involved classic taxing and spending programs that involved disbursements of federal money to grantees. *See* pp. 29-30, *supra* (discussing *Flast* itself and *Bowen* v. *Kendrick*). By contrast, 10 U.S.C. 2554 does not implement a program of disbursing funds to grantees, or order the expenditure of federal funds in any particular manner. Quite the opposite, Section 2554 repeatedly states that the activities authorized by the law are loans, and that no expenses shall be incurred for the assistance provided to the Boy Scouts. 10 U.S.C. 2554(a) (loans of equipment); 10 U.S.C. 2554(b) ("No expense shall be incurred by the United States Government"); 10 U.S.C. 2554(c) ("without expense to the United States"); 10 U.S.C. 2554(d)

(same). Thus, by its plain terms, a central theme of Section 2554 is to ensure that federal funds are *not* spent and that budgetary costs are not incurred.

Section 2554 does permit the provision of services to the Boy Scouts as well as the use of military property, when Jamborees are held on base. *See* 10 U.S.C. 2554(a) and (g). But those services are by military personnel whom the government has to pay regardless of where they work any given week. With respect to those services, therefore, the statute does not authorize new or different spending. It simply directs how services that have already been paid for through other general legislation may be employed. Thus, this case falls squarely within *Flast*'s own holding that federal taxpayer standing does not exist where the plaintiff merely alleges "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U.S. at 102.

This rule from *Flast* also requires concluding that 10 U.S.C. 2554 does not implement a federal taxing and spending program within the meaning of *Flast* merely because federal money is expended in managing military property and personnel under Section 2554. The same could be said for almost all federal legislation, since the government's activities almost invariably involve paid federal officials, and those individuals are almost invariably doing something with equipment or resources that costs money. Thus, reading *Flast*'s first prong as authorizing taxpayer standing merely because government action is supported by federal funds would allow the exception stated in *Flast*

to consume the general rule, stated in *Frothingham*, that taxpayer status will not support Article III standing.

Indeed, virtually every action of every federal agency could be challenged by any taxpayer because some amount of federal funds would be expended. For example, the transfer of federal property in *Valley Forge* required the expenditure of some federal funds in processing paperwork and preparing the property for sale. *See also* 454 U.S. at 480 n.16 (noting that "public funds were expended to establish the Valley Forge General Hospital"). But that was not enough to confer standing. Likewise, in *Richardson* and *Schlesinger*, the Supreme Court held that taxpayer standing under *Flast* did not exist even though federal taxpayer funds supported the challenged government activity in both cases. Indeed, in *Schlesinger*, the plaintiffs specifically requested the district court "to compel petitioners to seek to reclaim Reserve pay received by reservist members of Congress." 418 U.S. at 228 n.17.

Plaintiffs do not allege that they have suffered any real injury that would be sufficient to give them Article III standing to challenge the military's support of the Jamboree pursuant to 10 U.S.C. 2554. *Cf. Sherman* v. *Community Consol. Sch. Dist.*, 980 F.2d 437, 441 (7th Cir. 1992) (student has Article III standing to challenge daily recitation of the Pledge of Allegiance in school because of personal exposure to the recitation), *cert. denied*, 508 U.S. 950

(1993). Thus, their interest in this case, at bottom, is merely to "use 'a federal court as a forum in which to air [their] generalized grievances about the conduct of government.'" *Reich* v. *City of Freeport*, 527 F.2d 666, 670 (7th Cir. 1975), *quoting Richardson*, 418 U.S. at 173. This they may not do.

3. Plaintiffs' Claim is not Redressable.

To establish standing, a plaintiff not only must identify an actual injury, but also must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs cannot make that showing here. As we have explained, other laws, such as 10 U.S.C. 2667 and 10 U.S.C. 2012(e), provide an independent source of authority for the military's support of the Boy Scout Jamboree. *See* pp. 8-10, *supra.* Indeed, the military had provided the same type of support for the Boy Scouts' Jamborees for more than three decades before the enactment of 10 U.S.C. 2554, under alternative sources of authority that do not apply exclusively to the Boy Scouts. *See ibid.*

Thus, plaintiffs' challenge to 10 U.S.C. 2554 would not redress the injury they allege, since the Secretary could continue to support the Boy Scout Jamboree under other statutory and regulatory authority. *See Valley Forge*, 454 U.S. at 481 n.17 ("Even if respondents had brought their claim within the outer limits of *Flast*, therefore, they still would have encountered serious

difficulty in establishing that they personally would benefit in a tangible way from the court's intervention.") (internal quotation marks omitted).

II. The Jamboree Statute Is Consistent With The Establishment Clause.

In *Agostini* v. *Felton*, 521 U.S. 203 (1997), the Supreme Court held that government aid to religion is consistent with the Establishment Clause as long as there is a secular purpose for the aid and it does not have the primary effect of advancing religion. *See id.* at 234. *Agostini* also observed that the Court uses three primary criteria to determine whether aid has the primary effect of advancing religion: whether it "result[s] in government indoctrination" of religion; whether it "define[s] its recipients by reference to religion"; and whether it "create[s] an excessive entanglement" between government and religion. *Ibid.*[7]

Plaintiffs do not contend that the military's support of the Jamboree lacks a valid secular purpose, and the district court therefore did not consider that aspect of the *Agostini* test. *See* Opinion at 37 (App. 37). As we have explained, the military's support of the Jamboree in fact serves a number of

[7] The Court did not discuss the concept of government endorsement of religion as such in laying out the above test for evaluating the constitutionality of government aid to religion. In applying that test to the program at issue in *Agostini*, however, the Court did explain that for the same reasons the aid satisfied the secular purpose and effects inquiries, it also "cannot reasonably be viewed as an endorsement of religion." 521 U.S. at 235 (citations omitted).

compelling military interests, including recruitment and public relations; training of active duty soldiers and reservists; and the construction and maintenance of training facilities at Fort A.P. Hill. *See* pp. 12-16, *supra*.

Plaintiffs also do not contend that the military's support of the Jamboree gives rise to excessive entanglement between government and religion, and the district court did not address that factor of *Agostini*'s secular effects test. Therefore, this case turns on whether the Secretary's support of the Jamboree "result[s] in government indoctrination" of religion or "define[s] its recipients by reference to religion." *Agostini*, 521 U.S. at 234. For the reasons explained below, the military's support of the Jamboree satisfies both of those factors.

1. The Military's Support of the Jamboree Is Based on Criteria That Neither Favor nor Disfavor Religion.

The district court held that the Jamboree statute "[d]efines its recipients by reference to religion" because it "contains no particular criteria on which the aid is allocated, neutral or otherwise," and merely authorizes the appropriation of funds to be used by the BSA, which the court found to be a religious organization because the Boy Scout Oath and Law, as a practical matter, exclude atheists and agnostics from becoming members or leaders. Opinion at 38 (App. 38).

As we have already noted, however, the BSA is a civic organization, not a religious organization, which focuses on citizenship training, community

service, and outdoor activity and physical fitness. *See* p. 5, *supra*. The BSA has no theology and does not engage in religious instruction itself, does not require its members to attend or participate in any sectarian religious ceremony, and considers religious training to be the responsibility of parents and religious leaders, not the BSA. *See* p. 6, *supra*.

Likewise, the Boy Scout Jamboree, which is the particular focus of plaintiff's Establishment Clause claims in this appeal, is predominantly a secular event, which focuses on the "primary activities of Boy Scouting: physical fitness, conservation, ecology, and the universal spirit of brotherhood." *See* p. 7, *supra* (citation omitted). The BSA allows religious organizations to hold religious services for individual scouts during the Jamboree, but that is done as an accommodation to scouts and their parents, because scouts attending the Jamboree must be away from home for an extended period. Moreover, no scout is required to attend such services. *See* pp. 52–53, *infra*.

The Supreme Court has never applied the Establishment Clause to a secular entity such as the Boy Scouts, or to a predominantly secular event such as the Jamboree, and such application would not be necessary to secure any protections the Establishment Clause was designed to provide. *See generally Van Orden* v. *Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment) (discussing Establishment Clause's purposes). Thus, the district court erred by wrongly assuming that the Establishment

Clause's applies to this case at all. *See generally Powell* v. *Bunn*, 59 P.3d 559, 579-80 (Or. Ct. App. 2002) (Boy Scouts is not a religious organization for Establishment Clause purposes because the "bulk of Boy Scouts' activities is secular (*i.e.*, recreational and social"), *review denied*, 77 P.3d 635 (Or. 2003). *See also Good News/Good Sports Club* v. *School Dist. of City of Ladue*, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993) (BSA is a "secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith"), *rev'd on other grounds*, 28 F.3d 1501, 1506 n.7 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). *But see Barnes-Wallace* v. *Boy Scouts of America*, 275 F. Supp. 1259, 1276 (S.D. Cal. 2003) (holding that the BSA is a religious organization for Establishment Clause purposes), *appeal pending*, Nos. 04-55732, 04-56167 (9th Cir.).

Even if the Establishment Clause were to apply to the military's support of the BSA, or, more particularly, to the Boy Scout Jamboree, the predominantly secular nature of the BSA and of its activities must be taken into account in determining precisely what the Establishment Clause requires. None of the Supreme Court precedent relied upon by the district court or the plaintiffs involved an entity of this nature, which is nonsectarian, has no religious affiliation, no religious tenets, and no religious practices.

In any event, as we detail below, the district court erred as a matter of law in holding that the Jamboree statute "[d]efines its recipients by reference to religion" in violation of the Establishment Clause. The military has supported the Jamboree over the years because that support furthers several compelling military purposes, and the applicable statutes and regulations allow the military to provide similar access and services to other institutions as well as to the Jamboree.

a. In *Agostini*, the Supreme Court held that the federal government's funding of certain educational services satisfied *Agostini*'s second "effects" criterion because it the aid was "allocated on the basis of criteria that neither favor nor disfavor religion." 521 U.S. at 232 (citation omitted). As the plurality in *Mitchell* likewise explained, "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . ., then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." 530 U.S. at 810 (plurality opinion) (citation omitted).

The district court should have held that the military's support of the Boy Scout Jamboree pursuant to 10 U.S.C. 2554 satisfies this *Agostini* effects criterion for the same reason. As we have demonstrated, the military supports the Jamboree because it provides unique and compelling benefits to the military in recruitment, public relations, training, and construction and

maintenance of military training facilities. *See* pp. 12-16, *supra*. By contrast, there is not one hint, in the text or history of 10 U.S.C. 2554 or the military's long history of supporting the Boy Scout Jamboree, of any intent on the part of Congress or the military to favor the BSA because of the nature of the Scout Oath and Law.

The record shows, therefore, that the military supports the Jamboree based on "criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 232. This is precisely the kind of neutrality toward religion *Agostini* and *Mitchell* require. *See Agostini*, 521 U.S. at 229 (noting that the constitutionality of a government aid program to primary and secondary schools does not depend "on the number of sectarian school students who happen to receive otherwise neutral aid"). *See also Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654 n.3, 658 (2002) (noting 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," not whether government support is in fact extended to one or more beneficiary or provider). To hold 10 U.S.C. 2554 unconstitutional, therefore, would prevent the military from achieving compelling military goals, without achieving any interest represented by the Establishment Clause. *Cf. Freedom from Religion Foundation, Inc.*, v. *McCallum*, 324 F.2d 880, 884 (7th Cir. 2003) (Establishment

Clause does not require the "sacrifice of a real good to avoid a conjectured bad").

Along the same lines, the district court erred by holding that the military's support of the Jamboree under 10 U.S.C. 2554 is "to the exclusion of other possible recipients." Opinion at 39 (App. 39). In fact, section 2554 does *not* preclude the military from supporting any event sponsored by any group on the same terms as it supports the Boy Scout Jamboree. Rather, as we have already explained, it merely provides express authority for support the military has provided the BSA since 1937 under preexisting statutory and regulatory authority. *See* pp. 8-10, *supra*. That authority permits the military to provide support for *any* group, as long as the support advances the military mission.

For example, 10 U.S.C. 2667 authorizes the military to lease military property to any public or private entity, as long as the arrangement promotes the national defense or is otherwise in the public interest. Similarly, 10 U.S.C. 2012 authorizes the military to provide support and services to "(1) [a]ny Federal, regional, State, or local governmental entity, (2) [y]outh and charitable organizations specified in section 508 of title 32, and (3) [a]ny other activity as may be approved by the Secretary of Defense on a case-by-case basis." 10 U.S.C. 2012(e). Notably, the youth and charitable organizations listed in 32 U.S.C. 508 include not only the Boy Scouts, but also the Girl Scouts of America, Boys and Girls Clubs of America, YMCA, YWCA, Civil Air Patrol, U.S.

Olympic Committee, Special Olympics, Campfire Boys and Campfire Girls, 4-H Club, Police Athletic League, and any other youth or charitable organization designated by the Secretary of Defense. *See* 32 U.S.C. 508(d).

Pursuant to this authority, the military provides support services for numerous special events held by private organizations, including the Special Olympics, the Goodwill Games, other major sporting events, Presidential inaugurations, and national political conventions. *See* Irizarry Decl., ¶ 2 (Sep. App. 66). The military also routinely opens its military bases and other property for appropriate use by civic organizations, under authority delegated to individual base commanders. *See* 10 U.S.C. 2012(e) (providing statutory authority for such aid). For example, as we have mentioned, parts of Fort A.P. Hill itself are open to the general public for outdoor recreation purposes. *See* p. 8, *supra*. *See also* Declaration of Kevin Bushey, ¶ 13 (Sep. App. 83) (explaining that, pursuant to section 1012, the military provides support, on average, for 100 events or projects per year, only a few of which are BSA projects).

Plaintiffs have neither proved nor attempted to prove that any private group has requested and been denied support equivalent to what the Secretary provides to the Jamboree, or that any particular event by any particular group would provide equivalent military benefit to the armed services as the

Jamboree provides. Thus, for all these reasons, the district court erred in concluding that the Jamboree statute fails the second prong of the *Agostini* effects test because it dispenses government benefits based on religious criteria.

Indeed, the military's support of the Jamboree is not the kind of "aid" that the Supreme Court has ever held creates Establishment Clause concerns at all. As we have explained, the military's support of the Jamboree is authorized by an arms-length contract entered into by the Secretary and the BSA, with both sides promising and providing valuable consideration for the agreement. The Boy Scouts agreed to make permanent improvements at Fort A.P. Hill and to allow the military to use those facilities except during the Jamboree, in exchange for priority to facilities at Fort A.P. Hill for ten days every four years. *See* DOD 002085 (Attachment to Irizarry Decl.) (Sep. App. 41).

The Supreme Court has never held that the Establishment Clause precludes the military from contracting with a religious organization for the provision of secular services. To the contrary, the Court has long held that the government may enter into contracts, leases, and other agreements with religious institutions for the provision of secular services. *See Comm. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980) (upholding direct cash reimbursements to religious and secular nonpublic schools for performing

various testing and reporting services mandated by state law); *American Jewish Congress* v. *Corp. for Nat'l and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) (upholding program management grants to private religious and secular colleges and universities for administrative costs they incur in participating in Americorps program), *pet. for cert. filed*, 74 U.S.L.W. 3130 (Aug. 30, 2005) (No. 05-282). *See also* p. 50, *infra* (citing additional cases). As we have shown, the military's support of the Boy Scout Jamboree furthers important military interests, and is supported by valuable consideration from the military as well as the Boy Scouts. The Establishment Clause, then, should be of no concern at all here.

b. The district court also concluded that the Secretary's support of the Jamboree under 10 U.S.C. 2554 fails the *Agostini* effects test because it would create a "'financial incentive to undertake religious indoctrination.'" Opinion at 37 (App. 37), *quoting*, *e.g.*, *Agostini*, 521 U.S. at 231. The court held that the Jamboree statute would create such incentives because it is not religiously neutral. *See ibid.*

As we have shown, however, the statute does not authorize support of the Jamboree on religious grounds, and does not authorize any support that is not equally available to other private groups under other statutory and regulatory authority. Indeed, the statute creates no financial incentives for individual scouts to attend the Jamboree at all. Thus, the district court was

wrong to conclude that the statute creates financial incentives to undertake religious indoctrination. *See Agostini*, 521 U.S. at 231 (financial incentive to undertake religious indoctrination does not exist where aid is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion").

2. The Military's Support of the Jamboree Does not Result in Government Indoctrination of Religion.

The district court also held that the Secretary's support of the Jamboree pursuant to 10 U.S.C. 2554 results in government indoctrination of religion because the aid is given directly to the Boy Scouts, the BSA is a religious organization, and 10 U.S.C. 2554 is not religiously neutral. *See* Opinion at 29 (App. 29). We have already demonstrated that the BSA is not a religious organization for Establishment Clause purposes and that the Secretary's support of the Jamboree pursuant 10 U.S.C. 2554 is religiously-neutral. As we explain below, however, even if the Scout Oath and Law does render the military's support of the Jamboree under section 2554 subject to the Establishment Clause, the district court erred in holding that the Jamboree may not receive government aid for secular uses.

a. The Supreme Court distinguishes between two types of aid for Establishment Clause purposes. As a general rule, "direct aid," *i.e.*, aid that is provided to religious institutions, may not be used by those institutions for religious purposes. *See*, *e.g.*, *Agostini*, 521 U.S. at 228; *see also Mitchell*, 530 U.S. at 840 (O'Connor & Breyer, concurring in the judgment). No such

restriction applies to "indirect aid," *i.e.*, aid that is provided to beneficiaries rather than to the religious institutions themselves, as long as any aid that reaches religious institutions does so because of the genuine and independent choices of beneficiaries. *See*, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). *See also Freedom from Religion Foundation* v. *McCallum*, 324 F.3d 880, 882 (7th Cir. 2003). The district court correctly concluded that the Secretary's support of the Boy Scout Jamboree pursuant to 10 U.S.C. 2554 is "direct aid" for Establishment Clause purposes, since it is given to the BSA rather than to individual scouts. The court was wrong, however, to hold that the BSA may not receive direct aid from the government merely because it is a religious institution.

The Supreme Court has long held that the government may make direct payments to religious institutions for the purpose of providing secular government services. More than 100 years ago, for example, the Court upheld a federal grant to a religious hospital for erecting a building that would be used for treating people with contagious diseases. *See Bradfield* v. *Roberts*, 175 U.S. 291, 298 (1899). Numerous more recent decisions have likewise upheld the provision of direct aid to religious institutions. *See,* e.g.*, Mitchell* v. *Helms* and *Agostini* v. *Felton*, *supra*; *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (holding that religious institutions may receive federal grants for providing sexual abstinence counseling); *Roemer* v. *Bd. of Public Works*, 426 U.S. 736, 746 (1976)

(upholding state grant to religious university for improving buildings to be used for secular purposes); *Hunt* v. *McNair*, 413 U.S. 734, 749 (1973) (upholding issuance of revenue bond for benefit of a Baptist College, for use in constructing and maintaining buildings to be used for secular purposes); *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (upholding grants to church-related colleges and universities for construction of academic facilities for secular use).

Beginning in the 1970's, the Supreme Court issued a number of decisions holding that "pervasively sectarian" public primary and secondary schools could not constitutionally receive certain forms of government aid, even if they were willing to use that aid for secular purposes. Such institutions, the Supreme Court reasoned, could not be trusted to use government aid for secular purposes alone. *See*, *e.g.*, *Meek* v *Pittinger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985); *Aguilar* v. *Felton*, 473 U.S. 402 (1985). In *Mitchell* v. *Helms*, 530 U.S. 793 (2000), however, the Supreme Court abandoned the pervasively sectarian doctrine, and held that religious institutions, including religious primary and secondary schools, may receive federal aid as long as they use the aid for secular purposes. In doing so, the four-justice *Mitchell* plurality criticized the "pervasively sectarian" doctrine as unnecessary, "offensive," and of a "shameful pedigree." 530 U.S. at 827, 828. Similarly, Justices O'Connor and Breyer, concurring in the judgment, expressly rejected

the proposition that some religious institutions must be presumed unable to use government aid for secular purposes only. *See id.* at 857-858. *See also Columbia Union College* v. *Oliver*, 254 F.3d 496, 504 (4th Cir. 2001) (recognizing that *Mitchell* abandoned the pervasively sectarian doctrine).

The district court's ruling holding that the government may not support the Boy Scout Jamboree because the Boy Scouts is a religious organization directly conflicts with *Mitchell*. Pursuant to *Mitchell*, the BSA is not disqualified from receiving government support merely because the district court found it to be a religious institution, just as the pervasively sectarian schools in *Mitchell* were likewise not so disqualified. Rather, like any other organization, the BSA may receive government support, as long as it uses that support for secular purposes.

b. The district court did not suggest that the BSA uses federal funds to support any religious activity at the Jamboree. In fact, the record shows that no federal funds spent in support of the Jamboree are given to the BSA, *see* Irizarry Decl., ¶ 13 (Sep. App. 71), and that federal funds are spent only on secular services, not on any religious activity that may occur during the Jamboree. *See id.* at 12-14 (Sep. App. 70-71).

The record does show that "[s]ince the Jamboree is home to tens of thousands of participants from a wide variety of religious backgrounds for ten days, including a Saturday and Sunday," the BSA allows "a number of religious

organizations [to] make services of various denominations available to those who wish to participate." Smith Decl., ¶ 49 (Sep. App. 60). The BSA does not require scouts to engage in any religious activity, however, at the Jamboree or elsewhere, but leaves that decision to the individual scout and his or her parents and spiritual advisor. *See ibid.*; *see also id.* ¶ 28 (Sep. App. 53).

This accommodation of individual scouts' religious needs during the Jamboree is plainly permissible under the Establishment Clause. To begin with, the accommodation is made *by the BSA*, and thus is not fairly attributable to the military. In any event, even assuming that the BSA's accommodation were that of the military, the Supreme Court has "'long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.'" *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2117 (2005) (citation omitted). Pursuant to that doctrine, the courts have consistently upheld the practice of providing chaplains for individuals who are, for a time, deprived of the ability to engage in private religious services. *See*, *e.g.*, *Katcoff* v. *Marsh,* 755 F.2d 223 (2d Cir. 1985) (upholding Army chaplaincy program). The same rationale supports the BSA's decision to allow religious groups to offer religious services at the Jamboree.

The record also shows that, during the 2001 Jamboree, the BSA printed a booklet containing prayers that scouts could say during the Jamboree if they wished to do so, and distributed a "Troop Leader Guide" that reminded scouts

to bring along "a Bible, Testament, or prayer book" along with numerous other camping and personal items if they wished to do so. *See* Smith Decl., ¶ 49 (Sep. App. 60). These efforts also represent nothing more than a private organization's reasonable attempt to accommodate individual scouts' private religious needs while away from home.

Finally, the record shows that, at the 2001 Jamboree, scouts were allowed to earn a commemorative patch for the Jamboree along with five activity patch segments, including one for completing a 5K walk or run, one for participating in events in the "Action Center," one for participating in events at the "Outback Center," one for participating in special events, and one for "Duty to God." *See* Smith Decl., ¶ 49 (Sep. App. 61). To earn the "Duty to God" segment, scouts needed to (1) attend a religious service, (2) take part in at least three group prayer devotionals, (3) visit the religious drop-in center and fill out an interest card, (4) lead grace before a meal, or (5) meet a chaplain. *See ibid.*

The decision whether to engage in this activity, however, was left up to the choice of individual scouts. Moreover, the scouts' ability to earn one "Duty to God" patch segment (in addition to several secular patch segments) is not of constitutional magnitude, given the Jamboree's overwhelmingly secular content. *Cf. Mitchell* v. *Helms*, 530 U.S. at 833 (plurality opinion) ("*de minimus* use of government support for religious purposes does not require holding an entire aid program unconstitutional"); *id.* at 858 (O'Connor & Breyer, JJ,

concurring) (same). *See* Smith Decl., ¶ 45 (noting that "the programs, activities, and attractions at the Jamboree focus on the primary activities of Boy Scouting: physical fitness, conservation, ecology, and the universal spirit of brotherhood"); *ibid.* (listing activities provided at the 2001 Jamboree, including archery, air-rifle shooting, motocross, buckskin games, rappelling, trapshooting, fishing, scuba diving, snorkeling, canoeing, kayaking, rafting, and sailing).

3. A Reasonable Observer Would not Perceive the Military's Support of the Jamboree as an Endorsement of Religion.

As we have already noted, in *Agostini*, the Supreme Court held that for the same reasons the government aid at issue there had a secular purpose and effect, it also "cannot reasonably be viewed as an endorsement of religion." 521 U.S. at 235 (citations omitted). The same holds true here. The reasonable observer, who "must be deemed aware of the history and context" of the government action at issue, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring), would not view the military's longstanding support of the Jamboree as an endorsement of religion. Rather, the reasonable observer, acquainted with the history and context of the military's support of the Jamboree and of 10 U.S.C. 2554, would conclude that the military is supporting the Jamboree for secular reasons – because the Jamboree is an important recruiting tool and public relations outreach for the

military; provides unique opportunities for military training; and allows the military, aided by substantial contributions from the BSA itself, to expand on the physical facilities available for military training at Fort A.P. Hill.

Moreover, for the reasons we have explained above, the reasonable observer also would not view the Boy Scout Jamboree as a religious event, or the BSA as a religious organization. The BSA, as we have explained, is a secular, civic organization that focuses on teaching boys and young men patriotism, courage, self-help skills, and other secular values, and the Jamboree predominantly is an opportunity for scouts to pursue precisely those interests and values. The nonsectarian reference to God in the Scout Oath has minimal religious content, since the BSA does not define what constitutes a scout's duty to God, and that reference is there because the BSA considers reverence to be an aspect of good citizenship, not because the BSA is a religious institution. *See* p. 6, *supra*. *Cf. Elk Grove Sch. Dist.* v. *Newdow*, 124 S.Ct. 2301, 2325-2327 (2004) (O'Connor, J., concurring in the judgment) (emphasizing that the Pledge of Allegiance is constitutional because, among other reasons, its brief reference to God does not refer to a particular religion, has minimal religious content, does not constitute worship or prayer, and has existed for more than 50 years). For all these reasons, the reasonable observer inquiry strongly confirms that the military's support of the Jamboree does not violate the Establishment Clause.

Indeed, the endorsement inquiry weighs particularly heavily in favor of upholding the Secretary's support of the Jamboree. For example, it is highly significant that the military has been supporting the Jamboree for almost 80 years, since 1937, free of apparent controversy regarding the Establishment Clause (until this suit). This fact constitutes strong evidence that the military's support of the Jamboree does not violate the Establishment Clause. *Cf. Van Orden* v. *Perry*, 125 S.Ct. 2854, 2870 (2005) (Breyer, J., concurring in the judgment) (that a Ten Commandments monument had stood for more than 40 years on the Texas Capitol grounds without challenge "suggest[s] more strongly than any set of formulaic tests that few individuals . . . are likely to have understood the monument" as advancing religion). *See also Elk Grove School Dist.* v. *Newdow*, 124 S. Ct. at 2324 (O'Connor, J., concurring in the judgment) (noting that "the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy"); *Zelman*, 536 U.S. at 662 n.7 (noting that school voucher program "has ignited no 'divisiveness' or 'strife' other than this litigation").

CONCLUSION

For the foregoing reasons, this Court should vacate the injunction barring the Secretary from supporting the Jamboree pursuant to 10 U.S.C. 2554 and dismiss plaintiffs' Establishment Clause challenge to section 2554.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that, according to the word count provided in Corel Wordperfect 12, the foregoing brief contains 13,936 words. The text of the brief is composed in proportional Bookman Old Style typeface, with 12-point type, in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b).

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Certificate of Service

I hereby certify that on this 28th day of October, 2005, I filed the above Brief for Appellant, Appellant's Short Appendix, and Appellant's Separate Appendix by delivering 15 copies of the Brief and Short Appendix, and 10 copies of the Separate Appendix, along with a diskette containing a copy of the Brief, to Federal Express for overnight delivery to the Clerk's Office of the United States Court of Appeals for the Seventh Circuit. On the same day, I also served two copies of the brief and short appendix, one diskette, and one copy of the Appellant's Separate Appendix to Federal Express for overnight delivery to the following counsel:

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