



August 12, 2010
Via U.S. Mail and Email (bvs.board@bvsd.org)

Board of Education
Boulder Valley School District
6500 Arapahoe Road
Boulder, CO 80303

Re: ACLU's disinformation letter regarding recent United States Supreme Court decision and its impact on the Boy Scouts use of District facilities

To the Members of the Board of Education:

Alliance Defense Fund ("ADF") has learned that the Boulder County Chapter of the ACLU sent you a letter on August 2, 2010, regarding the United States Supreme Court's recent decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). The ACLU's letter badly misrepresents this decision. Moreover, the District would likely become the target of civil rights litigation if it followed the course of action set out in the ACLU's letter and excluded the Boy Scouts from its speech forum. To the contrary, the safest course for the District is to do nothing and to continue to grant the Boy Scouts equal access to its facilities.

In its letter, the ACLU claims that the *Martinez* decision justifies the District excluding the Boy Scouts from the public forum it has created for outside groups to use its facilities. The ACLU claims that *Martinez* upheld a public university's application of a nondiscrimination policy to exclude a Christian organization from its student organization speech forum based on the group's belief-based membership policies. This is not what *Martinez* says. One only has to quickly read the decision to understand this.

The Supreme Court expressly stated in *Martinez* that it decided *only* the constitutionality of the university's "all-comers" policy—which required recognized student groups to "allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of status or beliefs." *Id.* at 2982, 2984. Crucially, the Court declined to reach the question of whether a public university could—consistent with the Constitution—exclude a religious student group from a speech forum based on a policy prohibiting discrimination based on various factors, including religion and sexual orientation. *Id.* at 2984 n.10 (declining to address the constitutionality of such a nondiscrimination policy because "that constitutional question is not properly presented").

Accordingly, the ACLU's advice that *Martinez* "eliminates" any concerns over legal liability regarding a decision to exclude the Boy Scouts from the District's speech forum pursuant to its nondiscrimination policy (which is *not* an all-comers policy) is wrong. Following it would likely result in legal liability for the District, not eliminate it.

Although the *Martinez* majority did not opine on the constitutionality of the course of action set out by the ACLU in its August 2, 2010 letter, the four dissenting Justices did. They explained that it would plainly violate the First Amendment's well-settled prohibition on viewpoint-based discrimination for the government to rely on a nondiscrimination policy to exclude a private group from a speech forum based on its membership policies regarding religion and/or sexual orientation. Yet this is precisely what the ACLU advises you to do in relation to the Boy Scouts.

The dissenting Justices in *Martinez* first explained how applying a prohibition on religious discrimination against a religious student group violated the First Amendment:

[T]he Nondiscrimination Policy "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." But the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination.

Id. at 3010 (Alito, J., dissenting).

The dissenting Justices further explained how applying a prohibition on sexual orientation discrimination would also violate the same group's First Amendment rights:

The Hastings Nondiscrimination Policy . . . also discriminated on the basis of viewpoint regarding sexual morality. CLS has a particular viewpoint on this subject, namely, that sexual conduct outside marriage between a man and a woman is wrongful. Hastings would not allow CLS to express this viewpoint by limiting membership to persons willing to express a sincere agreement with CLS's views. By contrast, nothing in the Nondiscrimination Policy prohibited a group from expressing a contrary viewpoint by limiting membership to persons willing to endorse that group's beliefs. A Free Love Club could require members to affirm that they reject the traditional view of sexual morality to which CLS adheres. It is hard to see how this can be viewed as anything other than viewpoint discrimination.

Id. at 3012.

The dissenting Justices did not break new ground. Rather, their view that precisely the course of action the ACLU suggests you follow would result in a constitutional violation is consistent with decades of Supreme Court precedent establishing the right of equal access of private groups to speech fora created by public schools and universities, free of content- and viewpoint-based discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel*

v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

In addition to this binding precedent, a federal statute also requires the District to provide the Boy Scouts and other patriotic organizations equal access to school facilities:

Notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in Title 36 (as a patriotic society).

20 U.S.C. § 7905(b)(1)(2002).

Given the above, it is thus not surprising that the only federal court to directly consider the question of whether the Boy Scouts may be excluded from a public school district's after-hours speech forum based on a school district policy prohibiting sexual orientation discrimination ruled in favor of the Boy Scouts. *Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295, 1311 (S.D. Fla. 2001) (finding that the "School Board's action barring the Boy Scouts from its facilities is a response to membership policies declared by the Supreme Court to be protected by the First Amendment" and issuing an injunction enjoining the school board "from preventing the Boy Scouts from using Broward County public school facilities and buses during the off school hours by reason of the Boy Scouts' membership policy").

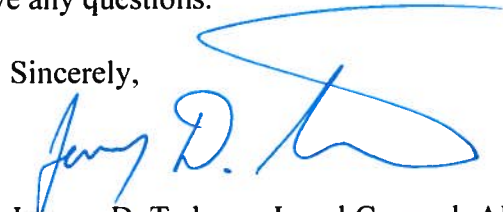
To sum up, the First Amendment mandates that the District provide the Boy Scouts equal access to its facilities. The First Amendment protects the Boy Scouts' membership policies regarding sexual conduct. The First Amendment prohibits the District from excluding the Boy Scouts from its speech forum based on their membership policies and pursuant to its nondiscrimination policy.

The ACLU's "advice" that the District may, consistent with the Constitution, exclude the Boy Scouts from its speech forum is a product of their well-documented national campaign to punish the Boy Scouts. It is by no means an accurate statement of the governing law. To act in accordance with the ACLU's advice would advance that organization's narrow political and social agenda, while at the same time squelching fundamental and well-established First Amendment freedoms. The District should not take such action. Doing so would certainly open it up to potential legal liability, not just in relation to the Boy Scouts, but also to any other groups who now (or in the future may) use the District's facilities. Once again, the District would best

eliminate any risk of litigation by doing nothing and continuing to grant the Boy Scouts equal access to its facilities.

Thank you for your attention to this important matter. Please feel free to call me to discuss this situation, should you have any questions.

Sincerely,



Jeremy D. Tedesco, Legal Counsel, ADF

cc: David A. Cortman, Senior Counsel, ADF
Michael J. Norton, Colorado Bar No. 6430