

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ANNE LOWN, ALICE BERGERON,
KATHLEEN COGAN-KOZUSKO, DIANE COPES,
MARY JANE DESSABLES, ERIC FINE,
MARGARET GEISSMAN, SHANTEE GORDON,
JESSICA GORHAM, KYOKO INOUE,
ALFREDA LEE-KATZ, PETR NIKICHIN, ESTELA
NUNEZ, MARINA OBERMAIER, SUSAN POPE,
JAMES PRESLEY, DANIEL QUANE, ANJA
TAEKKER,

Plaintiffs,

v.

THE SALVATION ARMY, INC., THE CITY OF
NEW YORK, WILLIAM C. BELL, Commissioner,
New York City Administration for Children's
Services, NEIL HERNANDEZ, Commissioner, New
York City Division of Juvenile Justice, THOMAS
A. MAUL, Commissioner, New York State Office
of Mental Retardation and Developmental Disabilities,
ANTONIA C. NOVELLO, Commissioner, New York
State Department of Health, ROBERT SHERMAN,
Commissioner, Nassau County Department of Social
Services, JANET DEMARZO, Commissioner, Suffolk
County Department of Social Services,

Defendants.

04 Civ.1562 (SHS) (THK)
(Electronically filed)

**THE UNITED STATES OF AMERICA'S SUPPLEMENTAL MEMORANDUM OF LAW
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS**

PRELIMINARY STATEMENT

The United States of America respectfully submits this supplemental Memorandum of Law as *amicus curiae* in support of the motions to dismiss filed by defendants. This Court granted the United States leave to participate as *amicus curiae* on October 14, 2004, and the United States filed a memorandum of law in support of defendants' motions to dismiss as to plaintiffs' constitutional claims. After defendants had filed motions to dismiss the first complaint, plaintiffs filed an amended complaint, adding claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The parties agreed that they would supplement their briefs on the motions to dismiss, rather than have defendants re-file their motions and have all the parties brief the issues anew. The Court accordingly granted the parties leave to supplement their memoranda on the underlying motions to dismiss and granted *amicus* an opportunity to supplement its memorandum in support of defendants' motions to dismiss. The United States hereby incorporates its initial memorandum of law by reference, and respectfully submits that, taken together, the initial memorandum and this memorandum demonstrate that plaintiffs have no cause of action and the amended complaint should be dismissed.

ARGUMENT

I. PLAINTIFFS HAVE NOT ALLEGED ANY NEW FACTS THAT ALTER THE CONSTITUTIONAL ANALYSIS OF THIS CASE

In paragraph 183 of their amended complaint, plaintiffs allege additional examples of the activities of the defendants that they believe should lead to the invalidation of the contracts between the Salvation Army and the government defendants. But these examples all suffer from the same defect as the allegations in their original complaint. They all focus on the degree of

religion in the Salvation Army's workplace generally. They say nothing about any alleged religiosity in the *services* the Salvation Army provides under the challenged contracts. Paragraph 183, like the other allegations in the original complaint, attempts to make the case that, notwithstanding the strict contractual terms requiring the services to be secular in nature, the Salvation Army's employment practices make it so inherently religious that any services it provides pursuant to government contracts must be constitutionally tainted. *See* The United States' Memorandum of Law As Amicus Curiae in Support of Defendants' Motions to Dismiss ("U.S. Mem.") at 15-16.

As set forth in the United States' principal brief, plaintiffs are attempting to revive the "pervasively sectarian" doctrine that the Supreme Court has abandoned. *Id.* at 19-21. The Supreme Court now upholds government aid flowing through religious institutions if the aid is secular in nature, if the recipients of the aid are not chosen with reference to religion, and if the program does not result in more than *de minimis* diversion to religious uses. *See id.* at 20. There is nothing in the new allegations to change the conclusion that the service contracts with the Salvation Army meet all of these criteria. These new allegations are simply more facts that address the nature of the Salvation Army as an organization, not the services being provided, and are thus irrelevant to the constitutional analysis.

II. PLAINTIFFS' TITLE VII CLAIMS SHOULD BE DISMISSED BECAUSE TITLE VII EXEMPTS THE SALVATION ARMY AS A RELIGIOUS ORGANIZATION

Plaintiffs' claims against the Salvation Army under Title VII should be dismissed as a matter of law because Title VII, by its terms, exempts religious organizations such as the

Salvation Army. Specifically, Section 702 of Title VII provides an exemption from Title VII's requirements for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). Plaintiffs do not contest that Section 702 applies to the Salvation Army, but instead appear to claim that an exception should be grafted onto Section 702's exemption. The plain language, the legislative history, and the Supreme Court's interpretation of Section 702 dictate that no exception should be recognized.

Prior to 1972, Title VII had allowed religious organizations to use the exemption only for "religious" activities. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 332 n.9 (1987). In 1972, Congress amended Section 702 to remove government interference with religious organizations' employment decisions with respect to any of the organizations' activities. *See* 118 Cong. Rec. 1979 (1972). The amendment clarified that religious organizations were exempt from Title VII religious discrimination claims with respect to *any* employment decision, regardless of whether the decision was related to religious or secular purposes. *Id.* at 1981; *see also* 42 U.S.C. § 2000e-1(a).

The legislative history of Section 702 reflects that "the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles." *Little v. Wuerl*, 929 F.2d 944, 950 (3rd Cir. 1991). The legislative history evinces an intent to shield religious organizations' hiring and terms and conditions of employment entirely with regard to religious matters. *Id.* For example, the following exchange occurred between Senator Ervin, the amendment's sponsor, and another Senator during debate: