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 INOUYE, 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 is 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:

"Does the Senator's amendment limit itself to the opportunity of a religious organization to have the right to hire people of its own faith? Is that the limitation of the amendment? Senator Ervin: I would allow the religious corporation to do what it pleased. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely.'" 118 Cong. Rec. 1982 (1972). The legislative history demonstrates that Section 702 should be read broadly to provide religious organizations the freedom to control and define their employment decisions with regard to religious matters.

The Supreme Court endorsed this broad reading of Section 702 in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), where the Court unanimously upheld Section 702 of Title VII as constitutional. In *Amos*, a religious organization terminated an employee of a non-profit gymnasium facility run by the church because the employee failed to demonstrate his membership in the church. The Court found that Title VII erected no barrier to terminating the employee, even though none of the employee's duties were related to the religious activities of the church. *Id.* at 330-31. The Court noted that the exemption actually alleviated "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. Further, the Court instructed that a broad exemption for religious organizations was more appropriate than courts trying to fashion a piecemeal rule:

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336. In his concurrence, Justice Brennan noted that the exemption preserved religious communities' freedoms: "Solicitude for a church's ability to [define itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Amos*, 483 U.S. at 342 (Brennan, J., concurring). Justice Brennan also commented on the reason an exemption was more appropriate than a more narrow, individual analysis: "A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity." *Id.* at 344.

The exemption in Section 702 squarely applies to the Salvation Army. Plaintiffs concede that Section 702 exempts religious organizations from Title VII's prohibition on considering religion in employment decisions. Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Pls. Supp. Mem.") at 10-11. Further, it is undisputed that the Salvation Army is a church. Moreover, the Section 702 exemption cannot be waived. *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (school did not waive 702 exemption by receiving federal funds); *Little*, 929 F.2d at 951 (religious organization's actions cannot waive 702 exemption). Thus, Title VII does not apply to the Salvation Army for employment decisions based on religion.

Aware that Section 702 is fatal to their statutory claims, plaintiffs argue that it would be unconstitutional to allow the Salvation Army to invoke it because of the contracts it has with the government to provide social services. They argue that the "claim of autonomy loses its force when the religious organization accepts government funding to provide state-mandated services." Pls. Supp. Mem. at 11. This argument, however, is merely a repackaging of the "state action"

and "pervasively sectarian" arguments in their principal brief, which the United States previously demonstrated are without merit. Specifically, with respect to the "state action" argument, plaintiffs repeatedly stress in their supplemental brief that the social services provided by the Salvation Army here are for "government-mandated" services, thereby transforming the Salvation Army into an entity no longer sufficiently private to invoke the Section 702 exemption. However, a private organization's receipt of government funds, even to perform a function that the government is legally obligated to provide, does not makes the organization any less private. *See* U.S. Mem. at 8-9. Moreover, allowing the Salvation Army to maintain its Section 702 exemption would not violate the Establishment Clause because, as the United States' principal memorandum emphasized, the Supreme Court has abandoned the "pervasively sectarian" doctrine. *See* U.S. Mem. at 19-20 (citing *Mitchell v. Helms*, 530 U.S. 793, 826-28 (2000)). Rather than looking at the recipient of government funds and determining its degree of religiosity in determining if the arrangement is constitutional, the Supreme Court now emphasizes that the program or activity being funded, and not the nature of the recipient, is determinative. *Id.* So long as aid is secular in nature, recipients are not selected with reference to religion, and the program does not result in more than *de minimis* diversion to religious uses, it is constitutional. *See id.* at 20. The religious nature of the organization is simply irrelevant. Thus, there is no reason that an otherwise constitutional program is tainted because the organization running the program is eligible for the Section 702 exemption.

Plaintiffs have offered no valid reason why the Section 702 exemption should be ignored here. Plaintiffs' Title VII claims against the Salvation Army should be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, and for the reasons contained in the United States' initial brief, this Court should grant the motions to dismiss of the Salvation Army and the Government Defendants.

Dated: December 13, 2004

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General
U.S. Department of Justice
Civil Rights Division

By: _____
DAVID ~~J.~~ PALMER (DJ-4884)
JOHN M. GADZICHOWSKI (JG-6605)
ERIC W. TREENE (ET-7594)
LESLIE M. GARDNER (LG-0605)
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, MJB 5531
Washington, D.C. 20035
Telephone: (212) 353-8622

DAVID N. KELLEY
United States Attorney for the
Southern District of New York

By: _____
JAMES L. COTT (JC-5176)
ANDREW W. SCHILLING (AS-7872)
Assistant United States Attorneys
86 Chambers Street – 3rd Floor
New York, New York 10007
Telephone: (212) 637-2695
Facsimile: (212) 637-2730

Attorneys for the United States of America