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 MEMORANDUM OF LAW AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

The United States of America respectfully submits this Memorandum of Law as *amicus curiae* in support of the motions to dismiss filed by Defendants, 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, and Janet Demarzo, Commissioner, Suffolk County Department of Social Services (collectively, "Government Defendants") and the Salvation Army.[1] This case involves various federal constitutional and state statutory and constitutional claims brought by current and former Salvation Army employees challenging certain alleged employment policies and practices of the Salvation Army. Of particular concern to the United States are Plaintiffs' claims that the Salvation Army's social service contracts with the Government Defendants have turned it into a state actor, and therefore its employment policies and practices are subject to challenge as violating the federal Free Exercise and Equal Protection Clauses, as well as the claim that the Salvation Army's employment practices, in light of these contracts, create an Establishment Clause violation. This attempt to bypass the federal statutory and constitutional rights of religious employers to define their character and maintain their religious integrity through their internal procedures and employment practices has no basis in

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1 A motion for leave to participate as *amicus curiae* accompanies this memorandum and is submitted within the time for filing of the Defendants' reply memoranda in support of their motions to dismiss. As set forth in the Declaration of Leslie Gardner, counsel for the United States has contacted the parties' counsel. Plaintiffs and all of the Defendants have consented to this motion.

constitutional law and should be rejected.

STATEMENT OF INTEREST

The United States has a strong interest in the federal constitutional principles governing this case. This case presents important questions of how the Establishment, Free Exercise, and Equal Protection Clauses of the Constitution should be applied to the Government Defendants' contracts with the Salvation Army. The United States, pursuant to numerous statutes and regulations, provides for grants and contracts with religious and other private organizations. *See, e.g.*, 42 U.S.C. § 604(a) (job training and other services); 42 U.S.C. § 290kk-1 (substance abuse services); 42 U.S.C. § 9920(a) (services authorized under the Community Development Block Grant Act); 16 U.S.C. § 470a(e)(3) (grants for preservation of historic properties). Indeed, the principal cases relied on by the parties in their memoranda filed with this Court all involved the constitutionality of funding under federal statutes. *See Agostini v. Felton*, 521 U.S. 203 (1997) (20 U.S.C. § 6301, *et seq.*); *Mitchell v. Helms*, 530 U.S. 793 (2000) (20 U.S.C. §§ 7301-73); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (42 U.S.C. § 300z, *et seq.*); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 832-33 (1982) (funding pursuant to state and federal statutes). The United States is currently engaged in litigation addressing the constitutionality of statutes and regulations providing grants and contracts with religious and other private organizations. *See Winkler v. Chicago Sch. Reform Bd. of Trs.*, No. 99-cv-02424 (N.D. Ill.) (Establishment Clause challenge to statutory programs through which the Department of Defense and the Department of Housing and Urban Development provide assistance to the Boy Scouts of America; *see* 10 U.S.C. §§ 1785, 2012, 2554, and 2606; 32 U.S.C. § 508; 42 U.S.C. §§ 5303, *et seq.*, 11901, *et seq.*); *American Jewish Congress v. Corporation for National and Community Service*, No. 02-cv-01948 (D.D.C.)

(Establishment Clause challenge to inclusion of religious schoolteachers in AmeriCorps Education Awards Program); *Laskowski v. Paige*, 03-cv-1810 (S.D. Ind.) (Establishment Clause challenge to Congressional earmark grant for teacher quality initiative at University of Notre Dame, Pub. Law 106-113 § 309 (Nov. 29, 1999)).

The disposition of this case could have a significant impact on the continued implementation of the federal Faith-Based and Community Initiative. The Initiative seeks to ensure that faith-based and secular organizations may compete on an equal footing for federal funding to provide social services to the public. *See* Executive Order No. 13199; Executive Order 13279 ("to ensure the equal protection of the laws for faith-based and community organizations, [and] to further the national effort to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations so that they may better meet social needs in America's communities . . . ."). Additionally, the Faith-Based and Community Initiative provides that, consistent with the Free Exercise Clause of the Constitution, "faith-based organizations should be eligible to . . . participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character." *Id.*

The decision in this case also may affect the interpretation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* Plaintiffs have called into question, by analogy to state provisions at issue in this case, the applicability of the exemption for religious organizations in Section 702 of Title VII, 42 U.S.C. § 2000e-1(a), to religious organizations operating programs with government funds. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss at 26-30 ("Plf. Mem."). The Section 702 exemption is an important element of the

Title VII statutory framework that protects the autonomy of religious organizations in employment decisions. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The United States has a strong interest in how Title VII is interpreted.

STATEMENT OF THE CASE

The Salvation Army is an international religious organization whose mission includes the provision of social services. Compl. ¶ 49. The Salvation Army's Social Services for Children ("SSC") and Social Services for Families and Adults ("SSFA") programs provide numerous social services such as foster care, adoption services, group home residences, residential treatment programs, and family rehabilitative program services. Compl. ¶ 66. Many of these services are provided pursuant to contracts with the State of New York, the City of New York, and the Counties of Nassau and Suffolk, Compl. ¶ 4, 59, and many accordingly receive funding and are subject to regulation by the State. Compl. ¶ 4. These regulations cover such areas as accounting practices, data collection and reporting, and training requirements. Compl. ¶ 90-112. Plaintiffs do not allege that any of the Government Defendants has any role in establishing the employment policies of the Salvation Army. Nor do they allege that the Salvation Army is teaching religion with government funds or otherwise weaving religious indoctrination into its government-funded programs.

Plaintiffs, who are current or former employees of the Salvation Army's SSC and SSFA programs, filed suit against the Salvation Army and the Government Defendants alleging that they have violated both state and federal law. Compl. ¶¶ 21-38. With respect to federal law, Plaintiffs allege that the Salvation Army has violated the Equal Protection Clause of the

Fourteenth Amendment and the Free Exercise Clause of the First Amendment, and that the Government Defendants have violated the Equal Protection Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment.

Plaintiffs allege that the Salvation Army has changed their terms and conditions of employment. Compl. ¶ 117. Specifically, Plaintiffs allege that the Salvation Army has inquired into their religious affiliations, Compl. ¶ 124, and has required them to be willing to support its mission, Compl. ¶ 147, and to perform their work with children in a manner that is consistent with its religious and charitable policies and principles. Compl. ¶ 144. They contend that the Salvation Army's contracts with the Government Defendants make it a state actor and thus answerable under the Free Exercise and Equal Protection Clauses as well as New York state law. As to the Government Defendants, Plaintiffs contend that the contracts violate the Establishment Clause and the Equal Protection Clause and the New York Constitution.

All Defendants have filed motions to dismiss. The Salvation Army argues that it is a religious organization working in furtherance of its religious mission, not a state actor, and therefore cannot be held to the legal standards of a government entity. Three of the four government defendants (the State of New York, the City of New York, and the Nassau County defendants) filed a joint motion to dismiss, asserting that their contracts with the Salvation Army do not violate the law. Janet DeMarzo, sued in her official capacity as Commissioner of the Suffolk County Department of Social Services, filed a motion to dismiss for lack of jurisdiction, insufficient service of process and failure to state a claim against her for which relief can be granted.

ARGUMENT

I. PLAINTIFFS' CONSTITUTIONAL CLAIMS AGAINST THE SALVATION ARMY SHOULD BE DISMISSED BECAUSE IT IS NOT A STATE ACTOR

Plaintiffs allege that the Salvation Army has violated the Equal Protection Clause of the Fourteenth Amendment by creating a hostile work environment, taking adverse employment actions, and altering the terms and conditions of employment based on religion. Plaintiffs further allege that such actions violate the Free Exercise Clause of the First Amendment.

Neither the Equal Protection Clause nor the Free Exercise Clause of the U.S. Constitution applies to private actors. The Supreme Court stated in *United States v. Morrison* that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." 529 U.S. 598, 621 (2000) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). Further, the Second Circuit recently held, "the United States Constitution regulates only the Government, not private actors." *Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) (quoting *United States v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 941 F.2d 1292, 1295-96 (2d Cir. 1991)). Plaintiffs argue, however, that because the Salvation Army administers services that the state, county, and city are required to provide, does so with government funding, is regulated by the government, and is entwined with the government, it should be treated as a government actor. Plaintiffs are mistaken, however. The Salvation Army is not a state actor under any of the theories by which the Supreme Court has found private entities to be engaging in state action.

A. The Salvation Army's Performance of its Contracts Does Not Meet the Criteria for State Action Set Forth in *Rendell-Baker v. Kohn*

The Salvation Army is not an arm of the government but is, as both sides admit, a religious organization that performs charitable works. Mem. of Law in Supp. of the Salvation Army's Mot. to Dismiss at 3; Compl. ¶ 49. However, Plaintiffs argue that in fulfilling its contracts with the Government Defendants the Salvation Army is performing a "public function" and thus should be treated as a state actor. Plf. Mem. This argument is without merit.

In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the Supreme Court held that the decisions of a private nonprofit school to discharge employees could not be attributed to the State even though the school received public funds, was subject to public regulation, served a function the State was legislatively obligated to provide, and contracted with the State to provide such services. Plaintiffs make similar allegations in the present case. Compl. ¶ 4.

Plaintiffs first allege that the Salvation Army receives funding from the State of New York, the City of New York, Nassau County, and Suffolk County, and that the challenged employment practices of the Salvation Army accordingly can be imputed to those public entities. It is true that the Salvation Army receives public money to administer its SSC and SSFA programs. Compl. ¶ 4. That funding, however, does not make the Salvation Army's personnel actions those of the State. The Court in *Rendell-Baker* did not attribute the school's decisions to fire employees to the State even though public funds accounted for as much as 99% of the school's operating budget. *Id.* at 840. Similarly, in *Blum v. Yaretsky*, 457 U.S. 991, 1101 (1982), the Court held that private nursing homes' decisions to discharge or transfer patients were not attributable to the State, even though the State subsidized both operating and capital costs and paid the medical expenses of more than 90% of the patients.

Plaintiffs also allege state action based on state regulation of the Salvation Army's programs at issue. Compl. ¶ 4. These regulations cover such areas as accounting practices, data collection and reporting, and training requirements. Compl. ¶¶ 90-112. This is also insufficient to establish state action. In holding that the actions of a private utility company, though subject to "extensive and detailed" regulation, were not imputable to the State, the Supreme Court in *Jackson v. Metropolitan Edison Co.* instructed that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. 345, 350-51 (1974). Plaintiffs' allegations of state regulation only concern the Salvation Army's provision of social services, not regulation of the Salvation Army's employment practices. In *Rendell-Baker,* public officials had the power to approve persons hired as vocational counselors in the school. Even with such state power to regulate the workforce of the school, which is not present in this case, the Court concluded that "[s]uch a regulation is not sufficient to make a decision to discharge, made by private management, state action." *Rendell-Baker*, 457 U.S. at 842.

Finally, Plaintiffs allege that the Salvation Army should be treated as a state actor because it is performing functions that are governmental in nature. Plf. Mem. at 38. While the Salvation Army is providing services that also are provided by government entities, that does not end the inquiry. Returning again to *Rendell-Baker*, the "relevant question is not simply whether a private group is serving a 'public function.'. . . [T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" 457 U.S. at 842 (emphasis in *Rendell-Baker*) (quoting *Jackson*, 419 U.S. at 353). The stringency of this requirement is illustrated by *Doe v. Harrison*, 254 F. Supp. 2d 338 (S.D.N.Y. 2003) (Stein, J.), in which the Court held that the

involuntary commitment of a mental patient by doctors at a private hospital was not "traditionally the exclusive prerogative of the State." *Id.* at 343 (quoting *Blum*, 457 U.S. at 1011). The Court noted that "an extraordinarily low number of . . . 'functions' have been held to be . . . 'public'." *Id.* at 343 (quoting *Ruhlmann v. Ulster Cty. Dept. of Social Services*, 234 F. Supp. 2d 140, 166 (N.D.N.Y. 2002)). The day care, foster care, adoption, nutrition assistance, and other such services provided by the Salvation Army's SSC and SSFA programs have long been provided by a variety of public and private entities, and it can hardly be said that such charitable undertakings are, or ever have been, the exclusive prerogative of the State. Indeed, there is a longer history of such services being provided by charitable institutions, and particularly by religious institutions, than by the government.

Plaintiffs rely on *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974), in arguing that the Salvation Army's provision of social services constitutes state action because the Government Defendants would have to provide such services in the Salvation Army's absence. Plf. Mem. at 40. To be sure, the Court in *Perez* stated that "[i]n certain instances the actions of private entities may be considered to be infused with state action if those parties are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties." *Perez v. Sugarman*, 499 F.2d at 765. As *Rendell-Baker* subsequently made clear, however, the fact that the Government Defendants are required by law to supply the services is insufficient to make the Salvation Army a state actor. The Court in *Rendell-Baker* held that while "the education of maladjusted high school students is a public function" and under state law there was "a legislative policy choice" to "provide services for such students at public expense," this "in no way makes these services the exclusive province of the

State." 457 U.S. at 842. Where as here, the function at issue is not traditionally the exclusive province of the State, a private entity does not become a state actor by performing such a function. *See id.*

Plaintiffs suggest that it is settled law in the Second Circuit, notwithstanding the Supreme Court's subsequent decision in *Rendell-Baker*, that private entities providing foster care services are to be treated as state actors. Plf. Mem. at 38-39. But *Perez,* the principal case upon which Plaintiffs rely for this bright-line rule, involved two private children's homes sued for illegally "detaining the [plaintiff's] children" after they were removed from their mother by the State. 499 F.2d at 761. The detention of children by the same two private children's homes was also challenged in the other pre-*Rendell-Baker* case relied on by the Plaintiffs, *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977). Plaintiffs cite *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988), as proof that their supposed bright-line rule regarding foster care survived *Rendell-Baker*. *Wilder*, however, illustrates that there is nothing inconsistent between any of the Second Circuit foster-care cases and *Rendell-Baker*, and these cases together support a finding that there is not state action here. *Wilder* involved a challenge to the "joint implementation" of statutes for assigning children to foster care by the City of New York and private agencies. *Id.* at 1315. The *Wilder* court heeded the Supreme Court's admonition in *Blum* that "adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint," 645 F. Supp. at 1315 (quoting *Blum*, 457 U.S. at 1003), and noted that in *Blum* the plaintiffs "[were] not challenging particular state regulations or procedures." *Id.* (quoting *Blum*, 457 U.S. at 1003) (alteration in original). Likewise, the *Wilder* court observed that "In [*Rendell-Baker v.*] *Kohn*, which involved the discharge of a vocational counselor hired by

a private high school under a federal grant, the Court found it significant that the substantial state and federal regulations to which the school was subject *did not extend . . . to personnel decisions*." *Id.* (emphasis added).

This observation in *Wilder* echoes the Second Circuit's earlier holding in *Perez*, where the court stated: "[A]ppellant argues only that the particular custodial power exercised here in detaining appellant's children constitutes 'state action' because there is a nexus between the public function being performed and the specific acts which are alleged to be objectionable." 499 F.2d at 766. "[T]his case directly involves defendants' mode of conducting the public function and does not involve a collateral aspect of the business of operating an institution which cares for children." *Id.* (citing *United States v. Wiseman*, 445 F.2d 792, 796 (2d Cir. 1971)). It is "[t]he existence of this nexus [that] has made the courts more receptive to a finding of 'state action'." *Id.*

Here there is no such nexus between the challenged action and any public function. The complaint addresses the Salvation Army's employment practices, which like the employment decisions in *Rendell-Baker*, do not arise directly from any government function traditionally reserved to the State. This case does not involve a challenge to the manner in which any child was removed from a home and held by the Salvation Army, as in *Perez* and *Duchesne*, allegations that the Salvation Army and the State are jointly implementing foster care placement regulations in an unconstitutional manner, as in *Wilder*, nor any other illegal exercise of any traditional government function. The Salvation Army is thus not a state actor under *Rendell-Baker*.

B. The Salvation Army Is Not Entwined with the Government Defendants

Plaintiffs also rely heavily on the Supreme Court's holding in *Brentwood Academy v.*

Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001), to suggest that the Salvation Army is a state actor because it is entwined with the Government Defendants. Plf. Mem. at 35-37. This reliance is misplaced.

In *Brentwood*, the Court held that an interscholastic high school athletic association's regulatory activity should be treated as state action because of the entwinement of public officials within the controlling body of the association. 531 U.S. at 291. The Court noted that this "entwinement of public officials" principle for finding state action is analytically distinct from the public function test of *Rendell-Baker*. *Id.* at 302. In *Brentwood*, the court found that since public school administrators comprised 84% of the voting membership of the governing council, State Board members were ex officio members of the governing council, and employees of the association were eligible for membership in the state pension system, there was "pervasive entwinement of state school officials in the structure of the association" and accordingly it should be treated as a state actor. *Id.* at 291. Here, Plaintiffs do not allege that any government official is a member of any decision-making body of the Salvation Army. There is thus no possible entwinement of public officials in the Salvation Army, and *Brentwood* is completely inapposite. *See also Doe v. Harrison*, 254 F. Supp. 2d at 343-44 (*Brentwood* not applicable where there was no allegation that defendant hospital was "composed of public officials" or that public officials directed "the hospital's day-to-day workings."). The Government Defendants have entered into value-for-value contracts with the Salvation Army for the provision of social services. They are "mere public buyers of contract services, whose payments for services rendered do not convert the service providers into public actors." *Brentwood*, 531 U.S. at 299 (citing *Rendell-Baker*, 457 U.S. at 839-43).

Under both *Rendell-Baker* and *Brentwood*, the Salvation Army is a private actor. It is thus subject to neither the Equal Protection Clause nor the Free Exercise Clause. Plaintiffs' constitutional claims against the Salvation Army accordingly should be dismissed.

II. THE GOVERNMENT DEFENDANTS' CONTRACTS WITH THE SALVATION ARMY FOR THE PROVISION OF SECULAR SOCIAL SERVICES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Plaintiffs allege that the Government Defendants' contracts with the Salvation Army violate the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 198. The contracts, however, advance the legitimate government interest of providing social services to citizens. This is sufficient to satisfy the level of review set forth by the Supreme Court in *Locke v. Davey*, 124 S. Ct. 1307 (2004). In *Locke*, the Court held that a state scholarship program did not violate the Free Exercise Clause by denying a scholarship to a student wishing to pursue a devotional theology degree. Because the scholarship program satisfied the First Amendment, the Court applied rational-basis scrutiny to the student's Equal Protection claim. *Locke*, 124 S. Ct. at 1313 n.3. Here, Plaintiffs make no Free Exercise claim against the Government Defendants, and their Establishment Clause claim, as set forth in Section III below, fails to state a cause of action. Their Equal Protection claim thus is subject to rational-basis scrutiny, and is without merit and should be dismissed.

Plaintiffs attempt to save their Equal Protection claim by relying on *Norwood v. Harrison*, 413 U.S. 455 (1973), a case in which the Supreme Court held that the State providing textbooks to a school engaging in racial discrimination violates the Equal Protection Clause. *Norwood*, however, is inapposite. Plaintiffs make no allegations, nor is there any evidence, that any defendant has engaged in any sort of racial discrimination. Indeed, the Court in *Norwood*

purposely stated that aid to the schools in the matter before it was entirely different from aid to religious schools. "Religious schools pursue two goals – religious instruction and secular education. Where carefully limited so as to avoid the prohibitions of the effect and entanglement tests, States may assist church-related schools in performing their secular functions." *Norwood*, 413 U.S. at 468. With regard to state aid to religious institutions, the Court stressed that "[t]he transcendent value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious [organizations]." *Id.* at 469. The Court in *Norwood* further distinguished the potential of permitting government entities to provide support to religious organizations stating: "[T]he Constitution . . . places no value on discrimination as it does on the values inherent in the Free Exercise Clause." *Id.* at 469-70.

The right of a religious organization to define itself through its employment practices and operating policies is an important element of religious freedom. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court held that "the ability of religious organizations to define and carry out their religious missions" by considering religion in the employment context, far from being invidious, is a value that is worthy of statutory protection and does not violate the Equal Protection Clause. *Id.* at 339. Justice Brennan explained in his concurrence in *Amos* that "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Id.* at 341-42 (Brennan, J., concurring,) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1389 (1981)). A religious

institution's maintenance of its religious character and integrity through its employment practices simply cannot be equated with racial discrimination. The Government Defendants' contracts with the Salvation Army, because they do not violate the Establishment Clause, are thus subject only to rational basis scrutiny and are not prohibited by the Equal Protection Clause.

III. THE GOVERNMENT DEFENDANTS' CONTRACTS WITH THE SALVATION ARMY FOR THE PROVISION OF SECULAR SOCIAL SERVICES DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

Plaintiffs claim that the Government Defendants' contracts with the Salvation Army constitute government advancement of religion in violation of the Establishment Clause. Importantly, they do not claim that the contracts themselves and the services provided under them are religious. *See* Plf. Mem. at 34 (the Salvation Army is "performing secular, government-funded, government mandated services"). Nor do they claim that the Salvation Army is teaching religion with government funds or otherwise weaving religious indoctrination into its government-funded programs. Rather, Plaintiffs focus on the employment practices of the Salvation Army, claiming that it has created an employment atmosphere that is discriminatory and hostile based on religion, Plf. Mem. at 9-10; that the Salvation Army has distributed and displayed religious materials in the workplace, Plf. Mem. at 11; that it has tried to indoctrinate employees, Plf. Mem. at 19; and that the administrative fees paid to the Salvation Army as part of the contracts are excessive and amount to a subsidy to the Salvation Army's religious mission. Plf. Mem. at 21-22. With regard to the government-funded programs, however, they do not allege that there is any religious content, but rather that the Salvation Army's policies may require employees to forebear from addressing certain subject matters. Plf. Mem. at 21. As set forth below, the Salvation Army's contracts with the Government Defendants do not constitute an

establishment of religion. There is no indication that the Salvation Army was chosen because of its religious nature. It is clear the services performed are secular. And there is no excessive entanglement of the government with the Salvation Army's religion.

Alleged government establishments of religion are evaluated under the general framework set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as refined by *Agostini v. Felton*, 521 U.S. 203 (1997). *See DeStefano v. Emergency Housing Group*, 247 F.3d 397, 406 (2d Cir. 2001). Under *Agostini*, a law does not violate the Establishment Clause if: 1) it has a secular purpose; and 2) its principal or primary effect neither advances nor inhibits religion. 521 U.S. at 233-34. The factors considered in evaluating the "effects" prong are whether the law results in government indoctrination, whether the law defines its recipients with respect to religion, and whether the government is excessively entangled with religion. *Id.*

A. The Contracts Have a Secular Purpose

The purpose prong is violated only where there is no secular purpose and the challenged action is motivated wholly by religious purpose. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). In *Bowen v. Kendrick*, 487 U.S. 589, 602-603 (1988), the Supreme Court ruled that a statute providing abstinence education grants to nonprofits, including religious nonprofits, did not violate the purpose prong because "on the whole, religious concerns were not the sole motivation behind the Act."

Here there is no allegation that Defendants considered religion at all in choosing the Salvation Army as the contractor to provide the various social services at issue. Indeed, Plaintiffs do not allege that the contracts themselves are objectionable; rather, they challenge the Salvation Army's subsequent employment actions. In any event, it certainly cannot be said that religion was

the sole motivation for the Government Defendants entering the contracts with the Salvation Army. The first criterion of *Agostini* is therefore met here.

B. The Principal or Primary Effect of the Contracts Is Not to Advance Religion

1. The Salvation Army's Employment Practices and Policies

Plaintiffs' central claim is that the government is advancing religion because the Salvation Army is performing its contracts using employees whose general terms and conditions of employment include various religious elements. However, the focus of the Establishment Clause analysis should be on whether the *service*s provided under the contract are secular in nature; the terms and conditions of the employment of those performing them is irrelevant.

As a religious organization, the Salvation Army is protected by the religious exemption of Section 702 of Title VII, which permits religious organizations to consider religion in the terms and conditions of employment. 42 U.S.C. § 2000e-1(a). The Supreme Court made clear in *Amos* that this exemption does not violate the Establishment Clause and may be applied to the secular nonprofit activities of a religious organization, regardless of whether the employee's position relates specifically to the religious mission of the organization: "It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids . . . intrusive inquiry into religious belief. . . ." 483 U.S. at 339.

Plaintiffs maintain that permitting the Salvation Army to continue to use the Section 702 exemption while performing a contract with the government amounts to an Establishment Clause violation. The Second Circuit, however, has rejected a similar argument. In *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996), the Court rejected a school's contention that it would be in violation of the Establishment Clause if it permitted a student Bible club to

limit its key leadership positions to Christians. The Court likened the situation to that in *Amos*, holding that just as there was no impermissible advancement of religion by Congress when it expanded the exemption in § 702 of Title VII to cover all activities of religious employers, there was no government benefit to religion in violation of the Establishment Clause in permitting the consideration of religion by the student group, even though it would be meeting at a government school and even though it would be the only group that would be permitted to consider religion: "As the [Supreme] Court explained in *Amos*, the flow of a 'benefit' only to a religious group does not mean that the government's actions are advancing religion. The School – like Congress in enacting Section 702 of the Civil Rights Act – would simply be 'allow[ing the Club] to advance religion.'" *Id.* at 866 (quoting *Amos*, 483 U.S. at 337).

Under *Hsu*, there is no impermissible advancement of religion by the government by allowing the Salvation Army to continue to pursue employment practices that carry out its religious mission. *Id.* at 866. If, instead of the Salvation Army, the Government Defendants had contracted with a secular organization such as the American Legion or Planned Parenthood, they would expect that these organizations would continue to hire people who shared their respective philosophies. *Hsu* makes clear that it does not violate the Establishment Clause for the government to apply this principle to religion as well: "exempting the Club from the nondiscrimination policy simply puts the Club on the same footing as non-religious clubs who make distinctions among their members on the basis of commitment." *Id.* at 865.

Plaintiffs' notion that the religious nature of the Salvation Army, as expressed through its employment practices, makes its contract performance an establishment of religion also is in direct conflict with the Supreme Court's decisions involving government aid to religious

organizations. To be sure, it is not clear that this case even need be analyzed as one of aid to religion. The contracts at issue are value-for-value contracts. That should be the end of the inquiry. *See Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (upholding commercial lease of airport retail space to religious organization for religious reading room since city was treating the lessee like other tenants).

Even applying the Court's aid cases, however, the employment practices of the Salvation Army do not create any Establishment Clause problem. In *Bowen v. Kendrick*, the Court stressed that it was permissible to include religious organizations among grantees providing programs on teenage sexual abstinence under the Adolescent Family Life Act, because "nothing in . . . prior cases warrants the presumption . . . that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner." 487 U.S. at 612. The Court thus found that the religious nature of grantees did not bar them from participating in the provision of secular services.

Plaintiffs' argument can be reduced to a claim that if a religious organization is so religious that it considers religion in the employment context, then it cannot receive government funds, even for secular programs. This is an attempt to revive the "pervasively sectarian" doctrine that was explicitly abandoned by the plurality and concurring opinions in *Mitchell v. Helms,* 530 U.S. 793 (2000). Under the "pervasively sectarian" doctrine, aid was presumed to advance religion when it was given to organizations, such as parochial schools, that were thought to be so infused with religion that even secular aid would effectively become the equivalent of religious aid. *See, e.g., Hunt v. McNair*, 413 U.S. 734, 743 (1973). The plurality in *Mitchell* observed that

the concept had not been invoked since 1985, despite subsequent cases permitting aid to parochial schools; that the concept had failed to give due recognition to the fact that government aid could fulfill its secular purpose regardless of whether a recipient is religious or secular; and that the "pervasively sectarian" concept "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 826-28. Justices O'Connor and Breyer, concurring in *Mitchell*, similarly abandoned the "pervasively sectarian" concept and rejected an underlying principle of that doctrine, that "the secular educational function of a religious school is inseparable from its religious mission." *Id.* at 853. Instead, their separate opinion maintained that for there to be a constitutional violation there must be *actual* diversion to religious uses. They made clear that aid that has "the capacity for, or presents the possibility of, such diversion" is insufficient. *Id.* at 854. Both the plurality and the separate opinion in *Mitchell* focus on the nature of the aid and whether it is distributed without reference to religion, with Justices O'Connor and Breyer adding the further requirement that the aid not be diverted to religious purposes. They also reject the idea that certain types of organizations are so religious that any aid given to them is necessarily constitutionally tainted. *See Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001) (holding that Justice O'Connor's opinion in *Mitchell* replaced the pervasively sectarian doctrine with one of "neutrality plus" no diversion of aid).

After *Mitchell*, the fact that the Salvation Army is religious, even if it is pervasively so, does not compel the conclusion that the government may not enter contracts with it to perform

secular services that otherwise comply with the Establishment Clause.[2] That the Salvation Army may consider religion in the terms and conditions of employment may make it more "pervasively sectarian" than it otherwise would be, but that designation is no longer relevant to the ultimate inquiry.

2. Alleged Infusion of Religion into the Programs

Most of Plaintiffs' allegations involve the Salvation Army's infusion of religion into the terms and conditions of employment. As set forth above, these claims do not state a cause of action for violation of the Establishment Clause.

Plaintiffs also claim, however, that the Salvation Army requires its employees to "act in a manner 'consistent with Salvation Army religious and charitable principles,'" Plf. Mem. at 21, thus making the secular programs religious in Plaintiffs' view. Plaintiffs do not identify anything specific that this agreement would require of them. Plaintiffs speculate, however, that they might be prevented from speaking to children about contraceptives, safe sex, abortion, and matters of sexual orientation. Compl. ¶ 174. Importantly, nowhere do they speculate that this might require the teaching of religious doctrine in the government-funded programs. At most, they allege that it would require that employees forebear from addressing certain subjects. Not addressing certain secular subjects, even if the reason for not addressing them is religious, however, is not religious indoctrination.

In *Bowen v. Kendrick*, the Court rejected the notion that giving religious organizations government money to teach abstinence education amounted to funding religious indoctrination in

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[2] For this reason, Plaintiffs' reliance on *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), which was based on the pervasively sectarian doctrine, is misplaced.

violation of the Establishment Clause. The Court specifically held that the fact that sexual abstinence coincided with the teachings of many religions – even the particular religion of the grantees – did not make the funding of abstinence programs religious in nature. 487 U.S. at 604-05, 621. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192 (1991) ("the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'") (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

Even assuming, as Plaintiffs suggest, that the Salvation Army would have its employees forebear from addressing certain issues, the content of the programs would remain entirely secular. Indeed, several contract provisions specifically require that the Salvation Army conduct its services without regard to religion. For example:

> The contractor shall not discriminate against any applicant for services for reasons based upon religion or religious belief. The contractor shall not use any monies received from the State to benefit or inhibit a particular religious belief.

Gov't Defendants' Ex. A, Supp. ¶ 1;

> There shall be no religious worship, instruction or proselytization as part of or in connection with the performance of this Agreement, except that recipients of the services may be allowed access to religious instructions or worship of their own persuasion.

Gov't Defendants' Ex. C ¶ T;

> The Contractor shall ensure the free access and free practice of religious services of the youth's choice. Religious participation is entirely voluntary, and facility staff shall not insist that any youth participate in any religious services.

Gov't Defendants' Ex. D, App. ¶ O-1. Plaintiffs do not allege that any religious content has crept into the program in violation of these contracts.

In *Agostini v. Felton*, the Court measured religious effect by 1) whether the law results in governmental indoctrination; 2) whether the law defines its recipients with respect to religion; and

3) whether the law creates an excessive entanglement. *Agostini*, 521 U.S. at 233-34. *See also DeStefano*, 247 F.3d at 406. This test is met here. First, there is no governmental indoctrination in the programs. As demonstrated, forebearance from addressing certain secular topics, even if religiously motivated, does not constitute religious indoctrination. Second, there is no allegation that the recipients of the services provided by the Salvation Army are being treated differently on the basis of religion. And third, there is no excessive entanglement with religion. Plaintiffs allege that the services the Salvation Army contracts to perform are regulated by the State, thus creating entanglement. Compl. ¶ 55. While "[i]t is true that when the constitutionality of state funding is measured by how taxpayer money is used by a recipient, the State must keep an eye on the activities that are supported by that funding . . .[, t]his alone is not necessarily excessive entanglement." *DeStefano*, 247 F.3d at 414. These regulations cover such areas as accounting practices, data collection and reporting, and training requirements. Compl. ¶¶ 90-112. Such requirements, however, are far less burdensome than those found not to result in excessive entanglement in *Bowen v. Kendrick*, 487 U.S. at 615-17. In *Bowen*, the State reviewed the programs and materials used by the religious grantees of federal aid, required extensive financial reporting and detailed evaluations of the services provided, and monitored the recipients' activities through periodic visits. *Id.; see DeStefano*, 247 F.3d at 414 (citing *Agostini*, 521 U.S. at 234 ("[W]e have not found excessive entanglement in cases in which States impose far more onerous burdens on religious institutions than the monitoring system at issue here.")).

Similarly, the funding of these programs satisfies the standard set forth in *Mitchell*. In *Mitchell* the Supreme Court upheld a program pursuant to which instructional aids such as computers were loaned to schools, including religious schools, to be used for secular instruction.

A four-Justice plurality found that aid that 1) does not "result in religious indoctrination by the government"; and 2) does not "define its recipients by reference to religion" does not violate the Establishment Clause. *Id.* at 808.

Justices O'Connor and Breyer, who joined in the judgment and wrote separately, would add a third requirement: that the secular aid not be *actually diverted* to religious use. *Id.* at 857 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question is, or has been, used for religious purposes."). However, Justices O'Connor and Breyer made clear that the actual diversion must be significant. De minimis diversions of government aid to religious purposes are insufficient to create an Establishment Clause violation. *Id.* at 861 (O'Connor, J., concurring).

Here, there is no allegation of religious indoctrination, only forebearance from addressing certain issues. There is no discrimination among recipients based on religion. And there is no actual diversion of aid to religious teachings, not even permissible "de minimis" diversion.

C. The Collection of Administrative Costs Does Not Create an Establishment Clause Violation

Plaintiffs allege that the Salvation Army has collected excessive administrative costs for the operation of the programs under the contracts. Plf. Mem. at 12. This does not create an Establishment Clause violation for several reasons. First, Plaintiffs provide no factual allegations to support their conclusory allegations that the amount collected exceeds the value of the administrative services provided. Nor do they allege that any such excess that is allegedly diverted to religious purposes is more than de minimis, as required by *Mitchell*. Second, the contracts explicitly provide that no funds may be diverted to religious use, *see* p. 22, *supra*, and Plaintiffs do not allege that the Government Defendants are aware, or should have been aware, of

any violations of the contract provisions. Plaintiffs thus have not alleged anything to demonstrate how the *government*, either in purpose, or in principal or primary effect, is advancing religion. Third, to the extent that there may have been some small profit, as may be anticipated by the government as a normal incident of contracts with private organizations, this would not be aid to a religious organization, but a normal feature of a value-for-value contract that would not violate the Establishment Clause. *See Christian Science Reading Room*, 784 F.2d at 1014-15.

CONCLUSION

For the foregoing reasons, this Court should grant the United States permission to participate in this case as *amicus curiae* and should grant the Motions to Dismiss of the Salvation Army and the Government Defendants.

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Respectfully submitted,

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