

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

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

Plaintiffs

-against-

THE SALVATION ARMY, INC., THE CITY OF
NEW YORK, JOHN B. MATTINGLY, 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.

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04 Civ. 1562 (SHS)

OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge.

Current and former employees of the Salvation Army bring this action for relief from the Salvation Army’s efforts to enforce compliance with its religious mission among its staff. Plaintiffs claim to have been subjected to unlawful religious discrimination and have brought suit against the Salvation Army, as well as against the City of New York and the commissioners of several state and local government entities that contract with the Salvation Army for the provision of social services. Plaintiffs allege violations of the First and Fourteenth Amendments to the U. S. Constitution, Title

VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., and various provisions of state and local law.

All defendants have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

As plaintiffs have failed to allege that the discrimination they suffered can properly be attributed to the government defendants, the motion of the government defendants is granted, except insofar as it pertains to plaintiffs' taxpayer-standing-based Establishment Clause claim. Because the Salvation Army is not a state actor, and because it enjoys statutory exemptions from liability for religious discrimination, its motion to dismiss is granted with respect to all claims against it, except plaintiffs' retaliation claims pursuant to state and city law.

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I. BACKGROUND

The factual allegations, as set forth in the Amended Complaint, are recounted below.

A. The Parties

The plaintiffs, eighteen present and former employees of the Salvation Army,¹ include taxpayers of each of the jurisdictions represented by the government defendants. (Am. Compl. ¶¶ 2, 15). Sixteen of the plaintiffs have worked at Social Services for Children (“SSC”), a Salvation Army program that provides social services on behalf of the City of New York, the State of New York and the Counties of Nassau and Suffolk. (Id. ¶ 1).

The defendants are the Salvation Army, the City of New York and the commissioners of several state and local government entities that contract with the Salvation Army for the provision of social services. The Salvation Army is a not-for-profit corporation organized pursuant to the laws of the State of New York. (Id. ¶ 41). John B. Mattingly is the Commissioner of the New York City Administration for Children’s Services; Neil Hernandez is the Commissioner of the New York City Division of Juvenile Justice; Thomas A. Maul is the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities; Antonia C. Novello is the Commissioner of the New York State Department of Health; Robert Sherman is the Commissioner of the Nassau County Department of Social Services; Janet DeMarzo is the Commissioner of the

¹ Anne Lown was the Associate Director of SSC (Am. Compl. ¶ 22); Alice Bergeron is the Mental Health Department Office Manager of SSC (id. ¶ 23); Steven Bielarski was the Assistant Director of Training of SSC (id. ¶ 24); Kathleen Cogan-Kozusko was the Director of Foster Home and Adoption Services of SSC (id. ¶ 25); Diane Copes was a Family Caseworker in the Foster Home Adoption Services Department of SSC (id. ¶ 26); Mary Jane Dessables was the Management Information Systems Director of SSC (id. ¶ 27); Eric Fine is the Assistant Director of Clinical Services in the HIV Services Program of SSC (id. ¶ 28); Margaret Geissman was the Director of the Human Resources Department of SSC (id. ¶ 29); Shantee Gordon is a Group Home Independent Living Specialist at SSC (id. ¶ 30); Jessica Gorham was a Social Worker/Foster Care Caseworker in the Foster Home and Adoption Services Department of SSC (id. ¶ 31); Kyoko Inouye was a Social Worker/Foster Care Caseworker in the Foster Homes and Adoption Services Department of SSC (id. ¶ 32); Alfreda Lee-Katz is the Director of the Independent Living Program of SSC (id. ¶ 33); Petr Nikichin was a Human Resources Assistant at SSC (id. ¶ 34); Estela Nunez is the Recruitment Coordinator in the Foster Home and Adoption Services Department of the Salvation Army (id. ¶ 35); Marina Obermaier was the Assistant Director for Homefinding of SSC (id. ¶ 36); James Presley is the Mental Health Coordinator for the Manhattan Unit of the HIV Services Program of the Salvation Army (id. ¶ 38); Daniel Quane is the Director of Training for SSC (id. ¶ 39); and Anja Taekker is a Foster Care Caseworker in the Foster Home and Adoption Services Department of SSC (id. ¶ 40).

Suffolk County Department of Social Services (collectively, the “individual defendants”). (Id. ¶ 43-48). Each of the individual defendants is sued in his or her official capacity for injunctive relief. (Id.). Together with the City of New York, the individual defendants are referred to as the “government defendants.”²

B. The Salvation Army’s Programs

The Greater New York Division of the Eastern Territory of the Salvation Army runs programs in New York City and several surrounding counties, including Nassau and Suffolk. (Am. Comp. ¶ 53). The Greater New York Division administers social services through two organizations, SSC and Social Services for Families and Adults (“SSFA”). (Id. ¶ 54). Under contract with the government defendants (id. ¶ 61), SSC runs various programs, a number of which involve government-mandated custodial care. (Id. ¶ 68). Nearly 90% of the clients SSC serves are referred by, or in the custody of, government agencies and are assigned to SSC involuntarily. (Id. ¶¶ 3-4, 66-67). Among the services that SSC provides to more than 2,300 clients daily are: “foster care and adoption services, group homes, boarding homes, a non-secure detention facility for juvenile delinquents, services for children with developmental disabilities, HIV services, and group day care.” (Id. ¶¶ 3, 65). SSC is subject to significant regulatory oversight in the provision of these services. For example, SSC is an “authorized agency” pursuant to New York Social Services Law § 371(10) for providing child welfare services, a registered family day care provider in New York City and a licensed group day care provider in Nassau County. (Id. ¶¶ 57-59).

SSC derives more than 95% of its approximately \$50 million budget from its contracts with government entities. (Id. ¶ 60).

² The United States is participating in this litigation as amicus curiae on the grounds that it has a particular interest in the outcome due to its charitable choice initiatives, which enable religious organizations to compete for federal contracts without abandoning their rights to discriminate in employment on the basis of religion. See 42 U.S.C. § 604a; see also White House Office of Faith-Based and Community Initiatives, Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved, <http://www.whitehouse.gov/government/fbci/booklet.pdf> (last visited Sept. 30, 2005).

virtually in full with funds that SSC receives through its government contracts. (Id. ¶ 64). Those contracts prohibit SSC from engaging in unlawful employment discrimination. (Id. ¶ 62).

C. Interaction Between Government Agencies and the Salvation Army

Plaintiffs allege several forms of cooperation between the government defendants and the Salvation Army. First, SSC staff and government employees allegedly work together to administer various services that SSC provides. (Am. Compl. ¶¶ 65-89). For example, with respect to foster care services in the City of New York, staff from the Administration for Children’s Services and SSC work in concert to “recruit potential adoptive parents, give orientations and training sessions, evaluate the suitability of pre-adoptive homes and coordinate the adoption process from initial planning to the adoption finalization in court proceedings.” (Id. ¶ 72). Second, as mandated by the government agencies with which it has contracts, SSC operates a variety of accounting systems for keeping track of payments to, and accounts maintained on behalf of, certain clients.³ (Id. ¶¶ 92-95). The State pays for much of the computer equipment necessary to manage these accounts. (Id. ¶ 93). Third, SSC must use several government-mandated systems for standardization of child welfare data.⁴ (Id. ¶¶ 98-110). SSC’s in-house data is routinely merged with data from the state’s central registry. (Id. ¶ 106). The data coordination procedures allegedly involve close cooperation among SSC and the relevant government agencies. (Id.). Fourth, the government defendants impose specific training requirements on SSC staff and clients. For example, SSC foster parents must

³ SSC transfers payments on behalf of New York State, New York City and Nassau County to over 350 foster parents and family care providers, as well as to over 100 family day care providers. (Am. Compl. ¶ 94). For some of its teenage clients and disabled clients, SSC oversees savings accounts, the funds for which come from the State, the City and Nassau County. (Id. ¶¶ 96-97). The State, the City and Nassau County routinely audit SSC to ensure compliant data entry and accounting with respect to these accounts. (Id. ¶ 95).

⁴ These include CONNECTIONS, New York’s Statewide Automated Child Welfare Information System (Am. Compl. ¶ 100); numerous program data report protocols (id. ¶ 102); the New York State Central Childcare Registry System (id. ¶ 103); HIPS, the ACS health tracking system (id. ¶ 104); PROMIS, the ACS preventative tracking system (id. ¶ 105); Stardat, the ACS system for tracking the amount of time children spend in foster care (id. ¶ 107); EQUIP scores used to determine “census capacities for programs and priority on allocation and assignment of new cases to agencies by ACS” (id. ¶ 109); and New York State’s Quality Assurance standards for mandated services (id. ¶ 110).

receive 30 hours of “Model Approaches to Partnership in Parenting” training, and SSC social workers must receive five days of new social worker training. (Id. ¶¶ 112-13). In addition, SSC child care workers, foster parents and social workers are required to undergo annual training on various topics including “child neglect and abuse, AIDS prevention and understanding, working with people with AIDS, first aid, CPR and Therapeutic Crisis intervention.” (Id. ¶ 114).

D. Diversion of Funds to the Salvation Army Church

Plaintiffs allege that SCC provides 10% of the revenue from its government contracts to the Salvation Army Church in the form of “field service” payments. (Am. Compl. ¶ 115). Although these payments purportedly reimburse the Salvation Army Church for administrative overhead expenses, SSC allegedly receives little administrative support in exchange. (Id. ¶ 116). Plaintiffs contend that SSC and its programs pay for their own administrative support despite making the “field service” payments. (Id. ¶ 116). The Salvation Army Church allegedly uses the “field service” payments to advance its religious mission. (Id. ¶ 118).

E. The Reorganization Plan

Historically, the Salvation Army did not scrupulously monitor SSC employees for adherence to the Salvation Army’s religious tenets. SSC had its own secular mission statement. (Am. Compl. ¶ 150). Nevertheless, in the several months leading up to the filing of the complaint, the Salvation Army began to infuse religion into SSC’s workplace. (Id. ¶ 6). The Salvation Army implemented a “Reorganization Plan” meant to advance a “One Army Concept” whereby the Salvationist spirit would be promoted among the Salvation Army’s social service programs. (Id. ¶¶ 120-22). The Reorganization Plan ensured that “‘a reasonable number of Salvationists along with other Christians [will be employed]’ because The Salvation Army is ‘not a Social Service Agency [but] a Christian Movement with a Social Service program.’” (Id. ¶ 120). The goal was that “‘[t]here should be one Salvation army with a single Mission Statement, driven by the vision of one leader.’” (Id. ¶ 122).

The Reorganization Plan outlined new responsibilities for Salvation Army leaders. For example, the Secretary for Personnel of the Greater New York Division must “conduct Sunday and weekday meetings at corps, residences, and social service institutions, within the division, with the aim of leading souls to Christ, the growth of Christian faith among the Salvation Army, and the instruction of our soldiers in Salvationism.” (Id. ¶ 123) (emphasis in Am. Compl.). The Secretary for Social Services must “safeguard the essential Christian perspective towards social services” and “promote the unique spirit of Salvationism in social services.” (Id. ¶ 124) (emphasis in Am. Compl.). The Reorganization Plan further directed that the Secretary for Personnel and the Secretary for Social Services of the Greater New York Division each “conduct all activities of his office with a view to accomplishing the Army’s fundamental purpose of proclaiming Jesus Christ as Savior and Lord, which purpose must find expression in both the message proclaimed and the ministry of service performed.” (Id. ¶¶ 123-24).

The Reorganization Plan has affected the procedures of SSC’s human resources operation. The Salvation Army’s mission statement now appears on job descriptions and postings and reads as follows:

The Salvation Army, an international movement, is an evangelical part of the universal Christian church. Its message is based on the Bible. Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination.

(Id. ¶ 151). The Reorganization Plan also expressed concern about having a non-Christian Director of Human Resources at SSFA:

[W]e have chosen to hire a Director of Human Resources for Social Services for Families and Adults, who represents an eastern religion ... Is it responsible to have a Buddhist or Hindu present the Army’s Mission Statement and to expect that she will be able to represent us well when questions are asked? We are not a Social Service Agency. We are a Christian Movement with a Social Service Program.

(Id. ¶ 125). Salvation Army leaders conveyed similar anxiety regarding the religious affiliation of human resources staff at SSC. In March of 2003, Colonel Paul Kelly required the Director of Human Resources at the Divisional Headquarters, Maureen Schmidt, to contact SSC's Human Resources Director, plaintiff Margaret Geissman, in order to collect information on the religious affiliation of SSC Human Resources staff. (Id. ¶ 126). After Geissman refused to compile the requested information, she was informed by Schmidt that ““they are going to find out about everyone eventually because they want more Christians, especially Salvationists employed at SSC.”” (Id.). Kelly also voiced concern that Geissman might be Jewish, but Schmidt informed him that she was not. (Id. ¶ 127).

Schmidt asked Geissman to name the homosexuals working at SSC, but Geissman refused to comply. (Id. ¶ 128). Geissman complained to Schmidt and to then-SSC Executive Director Robert Gutheil that she felt the questions of Kelly and Schmidt were harassing and discriminatory. (Id.). Gutheil communicated Geissman's and his own concerns regarding the questioning to the leadership at Divisional Headquarters. (Id. ¶ 130). The Salvation Army allegedly took no action to address the complaints. (Id. ¶ 133).

Before the advent of the One Army Concept, the Salvation Army's Employee Manual had expressly stated that the Salvation Army was not waiving “any right in the free exercise of religion” in its employment practices. (Id. ¶ 134). Nevertheless, a June 4, 2003 memorandum stated a principle of non-discrimination by SSC in employment with respect to creed. (Id. ¶¶ 134-36). Around September 16, 2003, Major Henrietta Klemanski, Secretary for Personnel for the Eastern Territory, distributed a memorandum announcing the abandonment of all addenda to the Employee Manual, including the June 4, 2003 memorandum. (Id. ¶¶ 137-38). Approximately six months later, the Employee Manual was officially revised to eliminate the principle of non-discrimination

with respect to creed that was contained in the June 4, 2003 memorandum.⁵ (Id. ¶ 139). The revised Employee Manual included a section entitled “‘The Rules of Conduct,’” which provided that although “[t]he Salvation Army does not make employment decisions on the basis of an individual’s sexual orientation or preference[,]” it nonetheless “‘reserve[s] the right to make employment decisions on the basis of an employee’s conduct or behavior that is incompatible with the principles of the Salvation Army.’” (Id. ¶ 140).

Employees also allegedly had to fill out a form acknowledging the receipt of the Employee Manual. That form contained the following statements:

I understand The Salvation Army’s status as a church and agree I will do nothing as an employee of The Salvation Army to undermine its religious mission.

I agree and understand that my services are a necessary part of The Salvation Army’s programs and that my conduct must not conflict with, interfere with, or undermine the Army’s programs or the Army’s purposes.

(Id. ¶ 141).

In effectuating the One Army Concept, the Salvation Army distributed a “Work with Minors Form” that all employees were required to complete. (Id. ¶ 142). That form mandated disclosure of employees’ “Present Church, Minister of Church, Other Churches attended regularly during the past

⁵ The Employee Manual, revised as of January 1, 2004 reads, in pertinent part:

It is the policy of the Salvation Army that it will provide equal opportunity for employment . . . except where a prohibition on discrimination is inconsistent with the religious principles of The Salvation Army.

As a religious organization, a branch of the Christian church, The Salvation Army reserves the right to make such employment decisions, adopt employment policies (including employee benefits) which are calculated to promote the religious and moral principles for which it is established and maintained, consistent with its rights to the free exercise of its religion guaranteed to it by the Constitution of the United States.

Without limiting the foregoing, by accepting employment with The Salvation Army, an individual acknowledges that The Salvation Army is a church, agrees to do nothing to undermine its religious mission, and acknowledges that conduct must not conflict with or undermine the religious programs of The Salvation Army, or its religious and moral purposes.

(Id. ¶ 139).

ten years.” (Id. ¶ 143). It also directed employees to permit the Salvation Army to procure information from employees’ churches regarding the fitness of those employees to work with minors.⁶ (Id. ¶ 146).

After communicating his disagreement with the policy of compelling SSC employees to sign the Work with Minors Form, then-Executive Director of SSC Robert Gutheil was fired. (Id. ¶¶ 154-56). Alfred J. Peck, who had been Director of SSFA, became the Acting Director of SSC. (Id. ¶ 157). Plaintiff Lown was asked to assume Gutheil’s job duties, but was demoted from Associate Executive Director to Associate Director. (Id.). Peck instructed Lown that all employees were to sign the Work with Minors Form by January 1, 2004. (Id. ¶ 158). He insisted that each employee record specific information and that answering questions by writing “not applicable” was not an option. (Id. ¶ 159). Despite Peck’s orders, Lown and Geissman agreed that they would not require

⁶ On the Work with Minors Form, employees were required to sign a statement containing the following representations:

6. I authorize any of the churches or other organizations and their representatives and my personal references listed above to give The Salvation Army any information they may have regarding my character and fitness to work with children. I release all such organizations and individuals from any liability that may result from their furnishing such information to The Salvation Army. I waive any right that I may have to inspect any records containing such information.

7. I am aware that The Salvation Army is a branch of the Christian Church and I agree that I will conduct myself in my work with children in a way that is consistent with the religious and charitable policies and principles of The Salvation Army.

8. Having provided the foregoing information and having affirmed the foregoing statements are true, I recognize that any false information or statements are punishable under the laws relating to perjury.

(Am. Compl. ¶ 146).

The Salvation Army has submitted a revised Work with Minors Form that does not contain questions requiring identification of present church and minister, as well as other churches attended during the past ten years. (See Ex. B to Aff. of Michael G. Dolan in Supp. of Salvation Army’s Mot. to Dismiss the Compl. dated May 14, 2004 (“Dolan Aff.”)). The revised form still includes the representations numbered 6, 7 and 8 listed above. (See id.). The affidavit to which the revised form is appended explains that the revised form “was approved for implementation nationally by The Salvation Army as of February 2004.” (Dolan Aff. ¶ 3). It is unclear, however, whether the revised form is in fact being used in place of the prior version. Nevertheless, on a motion to dismiss the complaint, the Court is required to construe factual allegations in the complaint as true and not to take extraneous evidence into account. See Blue Tree Hotels Inv. (Canada) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004). Therefore, the Court has not considered the modified Work With Minors Form.

new employees to sign the Work with Minors Form, and that they would send employment packages to Divisional Headquarters for approval without that form. (Id. ¶ 161). At the end of October of 2003, Divisional Headquarters refused to approve new SSC hires because their employment packages did not include Work with Minors Forms. (Id. ¶ 163).

On or about October 28, 2003, at a meeting of the SSC Cabinet, Peck explained to the senior managers of all SSC departments and programs that all job descriptions had to include the mission statement of the Salvation Army and that any employee refusing to sign a job description would be fired. (Id. ¶ 162). In November, Divisional Headquarters rejected new SSC job postings that lacked the Salvation Army's mission statement. (Id. ¶ 164). That same month, Geissman resigned because of the allegedly hostile work environment at SSC. (Id. ¶ 165). Petr Nikichin assumed Geissman's duties, but he resigned in February of 2004 for similar reasons. (Id. ¶ 166).

In late December, Peck informed Lown that she would be responsible for reporting the employees who failed to complete the Work with Minors Form by New Year's Day. (Id. ¶ 170). He also instructed that she formulate a corrective action plan for getting all employees who missed the January 1 deadline to sign the form. (Id.). In a January 1, 2004 memorandum to Peck, Lown – who in December had filed charges against the Salvation Army with the U.S. Equal Employment Opportunity Commission – conveyed an unwillingness to develop a corrective action plan in light of the fact that she had disputed the legality of the Work with Minors Form. (Id. ¶¶ 169, 171). Peck then relieved Lown of responsibility for obtaining completed Work with Minors Forms and reprimanded her for questioning whether it was appropriate to require SSC staff to attend an HIV training program with a religious focus. (Id. ¶¶ 172, 187-91). Lown resigned in February of 2004 because of the allegedly hostile work environment at SSC. (Id. ¶ 22). Peck requested that the various SSC program directors distribute the form to their respective staff members and collect the

completed forms before February 27, 2004; he also notified the directors that anyone who did not complete the form would be deemed “insubordinate” and fired. (Id. ¶¶ 173-74).

Plaintiffs allege that since the Reorganization Plan efforts began, manifestations of Christian faith have appeared in the workplace, including recitation of prayers at staff meetings and functions, frequent depositing of religious publications in employee mailboxes, conspicuous display of religious publications and regular public postings for prayer meetings and other religious events. (Id. ¶ 183). Plaintiffs claim that these circumstances and the Salvation Army’s intrusive inquiries have contributed to a hostile work environment that led to the constructive termination of plaintiffs Lown, Bielarski, Cogan-Kozusko, Copes, Dessables, Geissman, Gorham, Inouye, Nikichin and Obermaier. (Id. ¶¶ 8, 10, 22, 24-27, 29, 31-32, 34, 36).

F. Content of Services Delivered

Plaintiffs allege that the Reorganization Plan initiatives “conflict with plaintiffs’ ethical and professional obligations as social workers....” (Am. Compl. ¶¶ 8, 147, 152, 175). Plaintiffs explain that they:

cannot, as a matter of conscience and professional responsibility, sign a form stating that they would acknowledge and support The Salvation Army’s Evangelical Christian teachings, and fear that the new religious requirements will require them to provide mandated, government-funded social services to children in a manner that conflicts with their legal and professional obligations. For example, the children assigned to receive foster care and other services from The Salvation Army include sexually active teenagers who are at risk for HIV, sexually transmitted infections and unintended pregnancy. However, The Salvation Army condemns, among other things, non-marital sexual relationships, contraceptive use outside of marriage, homosexuality, abortion, social drinking, gambling, smoking and drug use as “unacceptable according to the teaching of Scripture.” Consequently, Plaintiffs claim that their legal and professional obligation to provide these teenagers with services conflicts with the religious principles of The Salvation Army.

(Id. ¶ 9; see also id. ¶ 176). Plaintiffs also claim that signing the Work with Minors Form would violate the Code of Ethics of the National Association of Social Workers. (Id. ¶ 180). The Code directs that ““social workers should not allow an employing organization’s policies, procedures,

regulations or administrative orders to interfere with their ethical practice of social work.” (Id.). Pursuant to the Code, ethical practice of social work includes an obligation not to “practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, sex, sexual orientation ... marital status, political belief, [or] religion.” (Id.).

G. Procedural History

Plaintiffs’ original complaint contained claims pursuant to the federal and New York State Constitutions, as well as state and local antidiscrimination laws. Defendants brought motions to dismiss that complaint pursuant to Fed. R. Civ. P. 12(b)(6). Before any adjudication of those motions, plaintiffs received notice of their right-to-sue from the U.S. Equal Employment Opportunity Commission and amended their complaint to include claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.⁷ The Court then denied defendants’

⁷ The Amended Complaint alleges seventeen causes of action. They are brought: 1) against the Salvation Army for violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; 2) against the government defendants for violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; 3) against the government defendants for violation of the Establishment Clause of the First Amendment to the U.S. Constitution; 4) against the government defendants for violation of the Establishment Clause of the First Amendment to the U.S. Constitution brought by plaintiffs as taxpayers; 5) against the Salvation Army for violation of the Free Exercise Clause of the First Amendment to the U.S. Constitution; 6) against the Salvation Army for violation of Section Eleven of Article I of the Constitution of New York State; 7) against the Salvation Army for violation of Section Three of Article I of the Constitution of New York State; 8) against the government defendants for violation of Section Eleven of Article I of the Constitution of New York State; 9) against the Salvation Army for discrimination in violation of 42 U.S.C. §§ 2000e-2(a), (m); 10) against the Salvation Army for discrimination in violation of New York Exec. L. § 296; 11) against the Salvation Army for discrimination in violation of New York City Admin. Code § 8-107; 12) against the Salvation Army for constructive termination in violation of 42 U.S.C. §§ 2000e-2(a), (m) on behalf of plaintiffs Lown, Bielarski, Copes, Dessables, Geissman, Gorham, Inouye, Nikichin and Obermaier; 13) against the Salvation Army for constructive termination in violation of New York Exec. L. § 296 on behalf of plaintiffs Lown, Bielarski, Copes, Dessables, Geissman, Gorham, Inouye, Nikichin and Obermaier; 14) against the Salvation Army for constructive termination in violation of New York City Admin. Code § 8-107(1)(a) on behalf of plaintiffs Lown, Bielarski, Copes, Dessables, Geissman, Gorham, Inouye, Nikichin and Obermaier; 15) against the Salvation Army for retaliation in violation of 42 U.S.C. § 2000e-3 on behalf of plaintiffs Lown and Geissman; 16) against the Salvation Army for retaliation in violation of New York State Exec. L. § 296(7) on behalf of plaintiffs Lown and Geissman; 17) against the Salvation Army for retaliation in violation of New York City Admin. Code § 8-107(7) on behalf of plaintiffs Lown and Geissman. (Am. Compl. ¶¶ 197-269).

motions to dismiss the original complaint as moot, and defendants brought the instant motions to dismiss the amended complaint.⁸

II. ANALYSIS

A. Standard

When reviewing a motion to dismiss for failure to state a claim for relief pursuant to Fed. R. Civ. P. 12(b)(6), a district court may only dismiss plaintiffs' claims if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Drake v. Delta Air Lines, Inc., 147 F.3d 169, 171 (2d Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (quotation marks omitted). A court must treat all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor. See Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000); Lee v. Bankers Trust Co., 166 F.3d 540, 543 (2d Cir. 1999).

"A complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Phillip v. Univ. of Rochester, 316 F.3d 291, 293 (2d Cir. 2003) (quoting Conley, 355 U.S. at 47); see also Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). The forgiving notice pleading rules "apply with particular stringency to complaints of civil rights violations." Phillip, 316 F.3d at 293-94.

B. The Government Defendants' Motion

Plaintiffs bring claims against the government defendants for alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Establishment Clause of the First Amendment to the U.S. Constitution and Article I, Section Eleven of the New York

⁸ The Court declines defendant DeMarzo's request to convert the motion to dismiss the Amended Complaint into a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The Court has not considered matters outside the pleadings and the motion is properly analyzed as one to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Constitution. Because plaintiffs have failed to state a claim upon which relief can be granted with respect to all their claims other than their taxpayer-standing-based Establishment Clause claim, the government defendants' motion to dismiss the complaint is granted in part and denied in part.

1. Equal Protection

Plaintiffs have failed to state claims against the government defendants for allegedly violating the federal Equal Protection Clause and Article I, Section Eleven of the New York Constitution by supporting the Salvation Army, which was allegedly engaged in discrimination on the basis of religion. The Amended Complaint does not contain allegations that the government defendants' respective decisions to fund SSC programs ran afoul of the Equal Protection Clause, nor that the employment practices of the Salvation Army may properly be attributed to the government defendants.

The Equal Protection Clause provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Section 1983 grants plaintiffs a cause of action for violations of the Fourteenth Amendment. 42 U.S.C. § 1983. It states, in pertinent part, that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]” Id.

The Equal Protection Clause prohibits the government from subjecting individuals to “selective treatment ... based on impermissible considerations such as ... religion.” Knight v. Conn. Dep’t of Public Health, 275 F.3d 156, 166 (2d Cir. 2001) (quoting Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000) (quotation marks omitted)). To state an Equal Protection Clause claim, plaintiffs must allege that the government decisionmakers acted with

discriminatory intent or purpose. See Thomas v. City of New York, 143 F.3d 31, 37 (2d Cir. 1998) (affirming dismissal of an Equal Protection Clause claim when “plaintiffs did not allege sufficient facts to support discriminatory intent on the part of the legislature.”); see also Patterson v. County of Oneida, 375 F.3d 206, 226 (2d Cir. 2004) (“[A] plaintiff pursuing a ... denial of equal protection ... must show that the discrimination was intentional.”); Knight, 275 F.3d at 166 (2d Cir. 2001) (Plaintiffs must show “that the decisionmakers ... acted with discriminatory purpose.”) (quoting McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)) (quotation marks omitted).

To plead intentional discrimination in violation of the Equal Protection Clause, a plaintiff must allege that the state expressly classified on the basis of a suspect characteristic, see Brown v. City of Oneonta, New York, 221 F.3d 329, 337 (2d Cir. 2000), applied a neutral program in an intentionally discriminatory manner, see id. (citing Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)), or promulgated a policy that was motivated by discriminatory animus and that had an adverse effect, see id. (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and Johnson v. Wing, 178 F.3d 611, 615 (2d Cir. 1999)). Plaintiffs never allege that the government defendants expressly classified on the basis of religion, intended to discriminate, nor possessed animus in the execution of the contracts at issue. Indeed, the contracts existed before the Salvation Army initiated the Reorganization Plan and they included provisions mandating that the Salvation Army not engage in unlawful employment discrimination. (See Am. Compl. ¶ 62). The absence of any allegations of impermissible intent or purpose, combined with allegations giving rise to the strong inference that the government defendants intended that the Salvation Army not discriminate, preclude plaintiffs’ Equal Protection Claim against the government defendants. See Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 869-70 (2d Cir. 1996) (holding that a public school permitting a religious

student club to discriminate on the basis of religion did not violate the Equal Protection Clause because “there is no invidious discrimination here....”).

The absence of allegations that the government defendants engaged in intentional or purposeful discrimination also proves fatal to plaintiffs’ claim pursuant to the New York Constitution.⁹ See Hayut v. State Univ. of New York, 352 F.3d 733, 754-55 (2d Cir. 2003) (applying the same analysis to a claim pursuant to Article I, Section Eleven of the New York Constitution as to a claim pursuant to the federal Equal Protection Clause) (citing Brown v. State, 89 N.Y. 2d 172, 190, 652 N.Y.S. 2d 233, 674 N.E. 2d 1129 (1996)); Under 21 v. City of New York, 65 N.Y. 2d 344, 360 n.6, 492 N.Y.S. 2d 522, 482 N.E. 2d 1 (1985).

Plaintiffs claim that Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973), supports their Equal Protection Clause claim because the case barred the government from providing material support to discriminatory organizations. Norwood held that the Equal Protection Clause prohibited the government from providing textbooks to private schools that engaged in racial discrimination. See id. Plaintiffs cite no cases applying the holding of Norwood to organizations that discriminate on the basis of religion. Indeed, the Norwood Court distinguished the case before it from others in which the government extended aid to religious schools because unlike discrimination on the basis of race to which the Constitution ascribes no value, discrimination on the basis of religion may stem from the right to free exercise, which is constitutionally protected. See id. at 469-70. The Court specifically noted that “the Constitution ... places no value on [racial] discrimination as it does on the values inherent in the Free Exercise Clause.” Id. Plaintiffs cannot lean on Norwood to support their Equal Protection claim.

⁹ Article I, Section Eleven of the New York State Constitution provides, in pertinent part:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The U.S. Supreme Court’s decision in Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987), further undercuts plaintiffs’ Equal Protection Clause claim. The Amos Court rejected an Equal Protection challenge to Section 702 of the Civil Rights Act of 1964, a provision that exempts religious organizations from the antidiscrimination principle of Title VII when they discriminate on the basis of religion in employment. See id. The Court explained that “where a statute is neutral on its face and motivated by a permissible purpose..., we see no justification for applying strict scrutiny to [that] statute [if it] passes the Lemon[v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)] test [for gauging violations of the Establishment Clause].” Amos, 483 U.S. at 339. In its Equal Protection Clause analysis, the Amos Court subjected Section 702 to the forgiving rational basis review standard, merely requiring a showing of “a rational classification to further a legitimate end.” Id.; see also Locke v. Davey, 540 U.S. 712, 720 n.3, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (“Because we hold ... that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to [plaintiff’s] equal protection claims.”). Similarly here, the Equal Protection Clause does not dictate rigorous scrutinizing of the contracts. Rather, meaningful constitutional scrutiny of those contracts is properly carried out pursuant to the Establishment Clause. The contracts are religion-neutral, and they were executed for the permissible purpose of providing social services. Therefore, for Equal Protection Clause purposes, the contracts are subject to mere rational basis review, a degree of scrutiny they plainly survive.

Plaintiffs have alleged no facts suggesting that the government defendants’ funding decisions constituted intentional discrimination, and have instead proffered facts suggesting that the government defendants intended that the Salvation Army not discriminate. Moreover, as discussed infra, the Salvation Army’s allegedly purposeful discriminatory actions may not be ascribed to the government defendants. Accordingly, plaintiffs’ claims pursuant to the Equal Protection Clause

and Article I, Section Eleven of the New York State Constitution against the government defendants are dismissed.¹⁰

2. Establishment Clause

The Establishment Clause of the First Amendment to the U.S. Constitution, which provides that “Congress shall make no law respecting an establishment of religion[.]” applies to the states through the Due Process Clause of the Fourteenth Amendment. See Zelman v. Simmons-Harris, 536 U.S. 639, 648-49, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002); DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 405 (2d Cir. 2001). Plaintiffs allege that by funding the Salvation Army, the government defendants have violated the Establishment Clause. Before determining whether plaintiffs have satisfactorily stated a claim for violation of the Establishment Clause, the Court must ascertain whether plaintiffs have properly alleged standing.

a. Standing

The doctrine of standing reflects the jurisdictional limitation in Article III of the Constitution that federal courts may only hear “cases and controversies.” The Supreme Court has interpreted Article III to impose three specific standing requirements that must be met before a federal court may exercise its jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); see also Baur v. Veneman, 352 F.3d 625, 631-32 (2d Cir. 2003). First, a plaintiff must have suffered “an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Lujan, 504 U.S. at 560 (internal citations and quotation marks omitted). “Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ...

¹⁰ Federal courts lack jurisdiction to enjoin state officers from violating state law. See Miller v. French, 530 U.S. 327, 332, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000) (citing Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)); see also Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 93 (2d Cir. 1998). Therefore, insofar as plaintiffs’ claim pursuant to Article I, Section Eleven of the New York Constitution is brought against defendants Maul and Novello, it would, in any event, be barred by the Eleventh Amendment.

trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Id. at 560-61 (citation and internal quotation marks omitted) (bracketed text and ellipses in Lujan). “Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Id. at 561 (citation and internal quotation marks omitted). The party invoking federal jurisdiction bears the burden of establishing each of these elements with “general factual allegations of injury resulting from the defendant’s conduct.” Id.

Here, plaintiffs bring two distinct Establishment Clause claims, both relating to the same conduct, namely defendants’ provision of “funds to finance The Salvation Army’s religious discrimination.” (Am. Compl. ¶¶ 202-03). One of these claims, claim number three, does not assert a particular basis for plaintiffs’ standing. The other, claim number four, is brought specifically in plaintiffs’ capacity as taxpayers of all the relevant political subdivisions.

Ordinarily taxpayers do not have standing to challenge expenditures of government funds. See Frothingham v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). In Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), the Supreme Court recognized an exception to that rule and permitted a taxpayer to bring an Establishment Clause action when there is “‘a logical link between [his status as a taxpayer] and the type of legislative enactment attacked’ as well as ‘a nexus between that status and the precise nature of the constitutional infringement alleged.’” DeStefano, 247 F.3d at 405 (quoting Flast, 392 U.S. at 102) (bracketed text in DeStefano); see also Bowen v. Kendrick, 487 U.S. 589, 620, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988). Taxpayer standing can apply to challenges to administratively provided grants. See Bowen, 487 U.S. at 619.

In Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 (2001), the United States Court of Appeals for the Second Circuit rejected the plaintiffs’ attempt to exercise taxpayer standing in an Establishment Clause claim, because “what was required for the establishment of taxpayer standing

Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 n.9, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987). That limited exception complied with the so-called “Ministerial Exception,” a doctrine interpreting the Free Exercise Clause to require that religious organizations be permitted to discriminate on the basis of religion when hiring individuals who perform religious functions. See Kraft v. Rector, Churchwardens, and Vestry of Grace Church in N.Y., No. 01-CV-7871, 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1301-04 (11th Cir. 2000); Combs v. Central Tex. Ann. Conf. United Methodist Church, 173 F.3d 343, 345-51 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461-65 (D.C. Cir. 1996); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 187-88 (7th Cir. 1994); Scharon v. St. Luke’s Episcopal Presbyterian Hosps., 929 F.2d 360, 362-63 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577-78 (1st Cir. 1989); Hutchinson v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986); Rayburn v. Gen. Conf. of Seventh-day Adventists, 772 F.2d 1164, 1172 (4th Cir. 1985).

In 1972, Congress amended Section 702 to provide religious organizations broader protection than that implicated by the Ministerial Exception. The amended version of Section 702 reads in pertinent part

This subchapter shall not apply to an employer with respect to ... 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). This revised language applied Section 702’s exemption to any activities of religious organizations, regardless of whether those activities are religious or secular in nature.

Pub. L. No. 88-352, 78 Stat. 255, formerly codified at 42 U.S.C. § 2000e-1 (1964), quoted in Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 799 (D. Utah 1984) (emphasis in Amos), rev’d, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).

In Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, the Supreme Court considered and rejected a constitutional challenge to the application of Section 702 when a religious organization discriminated against employees who perform secular functions. The lead plaintiff in Amos worked at the Deseret Gymnasium, a non-profit facility that was open to the public, but run by affiliates of the Church of Jesus Christ of Latter-day Saints. See id. at 330. After working at the gymnasium for sixteen years as a building engineer, the lead plaintiff was terminated because he failed to receive a certificate of membership in the Church. Id. Section 702 absolved the Church of liability for dismissing the lead plaintiff and the Supreme Court confronted the question of whether Section 702 went too far in accommodating the free exercise interests of religious organizations so as to contravene the Establishment Clause. The Amos Court applied the test of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), which requires that “a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.” DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 406 (2d Cir. 2001) (quoting County of Allegheny v. Am. Civil Liberties Union, Pittsburgh Chapter, 492 U.S. 573, 592, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (citing Lemon, 403 U.S. at 612-13)). The Supreme Court held that Section 702’s shielding of the Church from liability for the discharge did not violate the Establishment Clause. Amos, 483 U.S. at 330. To use an oft-cited phrase, the application of Section 702 was situated within the “room for play in the joints between the Free Exercise and Establishment Clauses[that] allow[s] the government to accommodate religion beyond free exercise requirements without offense to the Establishment Clause.” Cutter v. Wilkinson, 544 U.S. ---, 125 S. Ct. 2113, 2117, 161 L. Ed. 2d 1020, No. 03-9877, 2005 WL 1262549, at * 3 (May 31, 2005) (quoting Locke v. Davey, 540 U.S. 712, 718, 124 S. Ct. 1307, 158

L. Ed. 2d 1 (2004) (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)))(quotation marks omitted).

In Amos, the Supreme Court explained that the purpose prong of the Lemon test is violated when a governmental decisionmaker “abandon[s] neutrality and act[s] with the intent of promoting a particular point of view in religious matters.” 483 U.S. at 335. By contrast, Section 702 was meant to advance “a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” Id. The Court explained the burden on religious organizations that Section 702 was intended to mitigate as follows:

We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. 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. The Court concluded that Section 702 was enacted with the permissible purpose of freeing religious organizations from fear of liability that might otherwise interfere with how they realize their religious objectives. Id.

The Court in Amos next turned to the second Lemon requirement, namely that a challenged governmental action must have “a principal or primary effect ... that neither advances nor inhibits religion.” Id. (quoting Lemon, 403 U.S. at 612) (ellipses in Amos). The Court rejected the opinion of the district court, which considered Section 702 to have an improper effect when applied to secular employees. Id. at 337-38. The district court had feared that Section 702 “would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world.” Id. at 337. The Supreme Court maintained that the district court’s apprehension was not justified based on the record in Amos, which involved the

As with its state counterpart, Section 8-107(12) of New York City's Administrative Code confers on religious organizations a limited exemption from compliance with the otherwise applicable antidiscrimination law. It provides in pertinent part:

Religious principles. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment ... or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

N.Y.C. Admin. Code § 8-107(12). Plaintiffs contend that the city exception affords a narrower safe harbor than the state exception. Unlike the city exception, the state exception insulates a religious organization from liability for "taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." N.Y. Exec. L. 296(11). The city exception lacks the "taking such action..." language. See N.Y.C. Admin Code. § 8-107(12).

Plaintiffs maintain that the city provision therefore governs hiring and firing, but not situations in which religious organizations create religiously hostile work environments, as plaintiffs allege the Salvation Army did here. However, Section 8-107(12)'s language is sufficiently expansive to shield personnel policies of religious organizations beyond those relating to hiring and firing. The city exception's extension of protection to religious organizations for "limiting employment ... or ... giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained" is broad enough to encompass the type of hostile work environment that the Salvation Army allegedly imposed on plaintiffs. Id.

Plaintiffs maintain that the exceptions contained in N.Y. Exec. L. Section 296(11) and N.Y.C. Admin. Code Section 8-107(12) violate the Establishment Clause and the Equal Protection

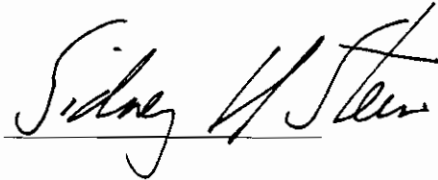
motion to dismiss the Amended Complaint is granted except as to plaintiffs' Establishment Clause claim predicated on taxpayer standing.

As the Salvation Army is not a state actor and as it enjoys certain statutory exemptions from liability for religious discrimination, plaintiffs' constitutional and statutory discrimination claims – other than those brought pursuant to state and city law for retaliation – against the Salvation Army must be dismissed.

Accordingly, the government defendants' motion to dismiss the Amended Complaint is granted in part and denied in part, and the Salvation Army's motion to dismiss the Amended Complaint is granted in part and denied in part.

Dated: New York, NY
Sept. 30, 2005

SO ORDERED:

A handwritten signature in black ink, appearing to read "Sidney H. Stein", written over a horizontal line.

Sidney H. Stein, U.S.D.J.