

No. 08-35532

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA SPENCER, VICKI HULSE, and TED YOUNGBERG,

Plaintiffs-Appellants,

v.

WORLD VISION, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

The Honorable Ricardo S. Martinez

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND
STATE, THE INTERFAITH ALLIANCE FOUNDATION, THE
AMERICAN HUMANIST ASSOCIATION, AND THE ANTI-
DEFAMATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF NEITHER
PARTY**

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INTEREST OF *AMICI CURIAE*

Americans United for Separation of Church and State (“Americans United”) is a national, nonsectarian public-interest organization based in Washington, D.C. Americans United’s mission is twofold: to advance the free-exercise right of individuals and religious communities to worship as they see fit; and to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

The Interfaith Alliance Foundation (“Interfaith Alliance”) celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

The American Humanist Association (“AHA”) is a nationwide, nonprofit humanist organization, dedicated to raising public awareness and acceptance of

humanism, and advancing humanist values. Through its Appignani Humanist Legal Center, the AHA focuses on defending religious liberty and protecting the fundamental rights of every individual — including nondiscrimination in government funded employment.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL’s core beliefs is strict adherence to the separation of church and state. Separation, ADL believes, preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each. Finally, ADL has filed *amicus curiae* briefs defending religious liberty in courts around the country, including the United States Supreme Court, in which we have filed a brief in every major religious freedom case during the last 50 years.

Amici are strongly committed to defending religious freedom. To that end, *amici* believe that religious organizations should be free to consider religion in connection with private personnel decisions without government interference. *Amici* further believe, however, that the government may not partner with those religious organizations by financing religiously discriminatory personnel decisions.

Although this case does not squarely present the question of whether the government may fund religious discrimination, the panel's decision summarily addressed this important and unsettled constitutional issue. *Amici* accordingly ask the Court to rehear the case or to revise the panel opinion so as to explicitly reserve this constitutional issue for another day.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case, brought by three former administrative employees of Defendant-Appellee World Vision, Inc. ("World Vision") who were terminated by World Vision on the basis of religion, involves a single issue: whether World Vision is a "religious corporation, association, educational institution, or society" that is entitled to 42 U.S.C. § 2000e-1's statutory exemption from the prohibition on religious discrimination in employment contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In a fractured decision that produced three different opinions, a divided panel of this Court ruled that World Vision qualifies

for the Section 2000e-1 exemption, and the panel affirmed the district court's decision granting summary judgment in favor of World Vision. Plaintiffs are currently seeking *en banc* rehearing of that decision.

This case does not raise the narrow, and unsettled, question of whether the Section 2000e-1 exemption can be constitutionally applied to permit a religious organization to engage in religion-based employment discrimination with respect to programs or positions that are funded directly by government money. Plaintiffs submitted limited evidence in the district court that World Vision receives a significant portion of its funding from government sources, but they did so only as support for their statutory argument that World Vision is not a religious organization entitled to claim the Section 2000e-1 exemption. There is no evidence in the record about whether any of the Plaintiffs' wages were paid in whole or in part with government funds, and Plaintiffs have not argued in this Court or in the district court that their jobs are wholly or partially government-funded. Nor have Plaintiffs raised any constitutional challenge to the application of the Section 2000e-1 exemption. Yet, the district court's decision and Judge O'Scannlain's lead panel opinion both broadly concluded that World Vision's receipt of government funds was immaterial to whether World Vision can assert Section 2000e-1 exemption to justify religious discrimination in employment.

Reliance on Section 2000e-1 to sanction religion-based employment discrimination for government-funded jobs raises significant constitutional concerns under the First Amendment's Establishment Clause. Those important issues should be decided only in a case where the parties have fully briefed and argued the constitutional issues and where the record clearly demonstrates that the employee's position was directly funded with public dollars. Based on the record before the Court, this is plainly not such a case. Accordingly, *amici* request that the Court revise the panel decision — whether through amendment of the panel decision, panel rehearing, or *en banc* rehearing — to expressly reserve the question of whether the Section 2000e-1 exemption is constitutional if construed to permit religious discrimination in employment decisions for government-funded jobs.

ARGUMENT

I. On The Record Before The Court, This Case Does Not Involve The Application Of Section 2000e-1 To Government-Funded Positions.

This lawsuit is before this Court on a very truncated factual record. After World Vision filed a Rule 12(b)(6) motion to dismiss Plaintiffs' complaint, the district court converted World Vision's dismissal motion into a motion for summary judgment and gave Plaintiffs "ninety days to conduct discovery to rebut defendant's assertion that it is a religious association fitting within the exemption set forth at 42 U.S.C. § 2000e-1." Dist. Ct. Dkt. No. 16, at 3. At the close of that limited discovery period, the parties completed the briefing on World Vision's

summary judgment motion, and the district court granted summary judgment in favor of World Vision. *See Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279 (W.D. Wash. 2008).

The record before the District Court on World Vision's motion contained very little evidence of World Vision's government funding, and no evidence concerning whether Plaintiffs' positions at World Vision were funded in whole or in part with government money. The sole piece of evidence in the record concerning the extent of World Vision's government funding is a graphic from World Vision's 2008 Annual Report showing that approximately 25% of World Vision's revenue over the period 2005-2007 came from government grants. *See* Dist. Ct. Dkt. No. 19-2, at 60; Plaintiffs' Excerpts of Record 83-84.

Plaintiffs have not argued or attempted to show — in either the district court or this Court — that their specific positions at World Vision were government-funded, or that any money from government grants was used to pay Plaintiffs' wages. Rather, Plaintiffs have pointed to World Vision's substantial government funding only as a piece of evidence in support of their argument that World Vision is, in fact, a secular organization, and not a religious organization that qualifies for Section 2000e-1's exemption from Title VII's ban on religion-based employment discrimination. *See* Dist. Ct. Dkt. No. 18, at 5:8-10, 14:6-14; Appellants' Brief at 10; Appellants' Petition for Rehearing *En Banc* at 2. Plaintiffs also have not

argued that application of the Section 2000e-1 exemption to this case would violate the Constitution.

In ruling that World Vision is entitled to claim the Section 2000e-1 exemption, both the district court and Judge O’Scannlain stated that World Vision’s government funding did not undermine World Vision’s claim that it is a religious organization or render World Vision ineligible to claim the exemption under Section 2000e-1. The district court unequivocally stated that “religious organizations receiving federal funds are not required to waive eligibility for [Section 2000e-1] protection,” and found that “Plaintiffs have not demonstrated how federal funding inhibits Defendant’s activities promoting religion.” 570 F. Supp. 2d at 1287-88. Similarly, Judge O’Scannlain asserted that Plaintiffs did “not explain how receipt of government funds undermines World Vision’s religiosity or bars its classification as a religious entity.” *Spencer v. World Vision, Inc.*, --- F.3d ----, 2010 WL 3293706, *15 n.22 (9th Cir. Aug. 23, 2010).

To be sure, the fact that an organization receives some portion of its revenue from government sources does not necessarily mean that the organization is not a “religious corporation, association, educational institution, or society” within the meaning of Section 2000e-1. But the categorical language in the district court’s and Judge O’Scannlain’s opinions erroneously suggests that an organization’s receipt and use of federal funds is *never* relevant to the application of Section

2000e-1 — a suggestion that threatens to effectively decide a complex constitutional question that is not presented in this case.

II. Applying Section 2000e-1 To Permit Religious Discrimination In Connection With Government-Funded Positions Would Raise Significant Establishment Clause Concerns.

Although the receipt of federal funds does not itself prevent an organization from establishing that it qualifies for the Section 2000e-1 exemption, it is an open question whether an organization that otherwise qualifies for the Section 2000e-1 exemption can, consistent with the Constitution, rely on that statutory exemption to justify discriminatory employment practices in connection with positions that are funded directly through government dollars. Given the advent of “charitable choice” legislation and “faith-based initiatives” at both the federal and state levels over the last fifteen years, religious organizations now regularly compete for, and are awarded, significant amounts of public money to develop and administer social services programs. Religious institutions have long enjoyed a statutory exemption from Title VII’s prohibition on religious discrimination in employment,¹ but because significant, direct government funding of religious organizations is of relatively recent vintage, neither the Supreme Court nor any court of appeals has

¹ Section 2000e-1’s statutory exemption originally applied only to employment decisions in connection with a religious organization’s “religious activities,” but the exemption was expanded in 1972 to remove the “religious activities” limitation. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 333 n.9 (1987).

directly addressed whether Section 2000e-1 can constitutionally be interpreted to permit a religious organization to discriminate on the basis of religion for jobs that are funded by government dollars.²

As explained below, application of the Section 2000e-1 exemption to sanction religious discrimination with respect to government-funded positions raises significant constitutional issues under the Establishment Clause.³ The Court should expressly reserve those important questions for a case in which they are briefed and argued by the parties and raised by the facts in the record.

On the most general level, the First Amendment's Establishment Clause prohibits government from taking actions that have either the purpose or the effect of advancing or inhibiting religion. *See, e.g., Agostini v. Felton*, 521 U.S. 203,

² 42 U.S.C. § 604a, the original "charitable choice" statute, provides that a religious institution is not required to forfeit the Section 2000e-1 exemption if it receives federal funds. That provision does not, however, purport to explicitly authorize religious discrimination in employment for government-funded programs or to expand the scope of the Section 2000e-1 exemption, and it could not, in any event, be interpreted to permit conduct that violates the Establishment Clause.

³ *See generally* Melissa Rogers, *Federal Funding and Religion-Based Employment Decisions, in* *Sanctioning Religion? Politics, Law, and Faith-Based Public Services* 105, 114-15 (David K. Ryan and Jeffrey Polet eds. 2005); Laura B. Mutterperl, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 *Harv. C.R.-C.L. L. Rev.* 389, 431-43 (2002). In addition, depending on the facts of the particular case, the provision of direct government aid to a religious organization that then discriminates on the basis of religion for jobs funded by that government aid could also raise significant issues under the Equal Protection Clause. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 471 (1973) (state violated Equal Protection Clause by providing textbooks to private schools engaged in racial discrimination).

222-23 (1997); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1055 (9th Cir. 2007). To determine whether government aid to a religious organization has the effect of advancing religion, the Supreme Court considers three “primary criteria”: (i) whether the aid results in government indoctrination; (ii) whether aid recipients are defined by reference to religion; and (iii) whether the aid creates excessive government entanglement with religion. *Mitchell v. Helms*, 530 U.S. 793, 845 (2000) (O’Connor, J., concurring);⁴ *Cnty. House, Inc.*, 490 F.3d at 1055, 1058.

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 upheld the Section 2000e-1 exemption against an Establishment Clause challenge. The Court first determined that Section 2000e-1 had a permissible legislative purpose of removing impediments to religious organizations’ ability “to define and carry out their religious missions.” *Id.* at 335. The Court also found that Section 2000e-1 did not have the effect of impermissibly advancing religion, because although Section 2000e-1 freed religious employers to further their religious goals, any resulting advancement of religion was not attributable to any government action. *See id.* at 337 (“A law is not unconstitutional simply because it *allows* churches to

⁴ This Court has recognized that Justice O’Connor’s concurrence in *Mitchell* is the controlling opinion from that case. *See Cnty. House, Inc.*, 490 F.3d at 1058 (“Justice O’Connor’s concurrence is the controlling authority given that she concurred in the result on narrower grounds than those on which the plurality rested.”).

advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through activities and influence.”).

Amos did not involve government funding.⁵ Indeed, the *Amos* court expressly contrasted the application of Section 2000e-1 in the case before it from situations involving government financial support of religion. *See Amos*, 438 U.S. at 338 (rejecting Establishment Clause claim and stating that “‘for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, **financial support** and active involvement of the sovereign in religious activity’”) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)) (emphasis added); *see Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, *3 (S.D. Miss. Jan. 9, 1989) (“[A]lthough *Amos* does not specifically address the issue of funding, the Supreme Court went to great lengths to distinguish *Amos* from *Lemon* on the questions of financial support . . .”). *Amos*,

⁵ *See* Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 *Hastings Const. L.Q.* 1, 37 & nn. 198-99 (2002) (noting *Amos* parties’ statements in Supreme Court briefs and at oral argument that *Amos* did not involve questions of government financial support for religion); Vikram Amar & Alan Brownstein, *The “Charitable Choice” Bill That Was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, *Findlaw, Legal Commentary* (May 13, 2005), http://writ.news.findlaw.com/commentary/20050513_brownstein.html, at 3 (same).

therefore, does not resolve whether Section 2000e-1 is constitutional insofar as it is applied to permit religious discrimination with respect to government-funded jobs.

Subsequent caselaw and the fundamental principles underlying the Establishment Clause, however, strongly suggest that Section 2000e-1 violates the Establishment Clause when applied to government-funded positions. In *Dodge*, one of only two federal decisions that have directly addressed the intersection of Section 2000e-1 and government-funded employment, the U.S. District Court for the Southern District of Mississippi held that Section 2000e-1 was unconstitutional as applied to publicly funded jobs because applying the provision in such circumstances would have a primary effect of advancing religion and would result in impermissible government entanglement with religion. 1989 WL 53857 at *3. The plaintiff in *Dodge* worked as a victim assistance coordinator at a Salvation Army domestic violence shelter — a position that the Court determined “was funded substantially, if not entirely, by federal, state and local government” — and was fired for having Wiccan beliefs. *Id.* at *1-3. The plaintiff sued under Title VII, and the Salvation Army defended the claims by asserting that it was exempt from Title VII based on Section 2000e-1. *Id.* at *1. The *Dodge* court acknowledged the Supreme Court’s *Amos* decision, but held that because the plaintiff’s particular position with the Salvation Army was funded directly by

government grants, allowing the statutory exemption to defeat her claim would violate the Establishment Clause:

The grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion, concerning the employment of the Victim's Assistance Coordinator, would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement. For these reasons Section 702 as applied to the facts in the case sub judice is unconstitutional

Id. at *4.⁶

The *Dodge* court's decision was correct. As the Supreme Court and this Court have recognized, "actual diversion of secular government aid to religious indoctrination violates the Establishment Clause." *Cnty. House, Inc.*, 490 F.3d at 1059 (*citing Mitchell*, 530 U.S. at 840-42 (O'Connor, J., concurring)). The Establishment Clause prohibits government from providing direct monetary aid to further a religious organization's religious mission, and allowing religious institutions that receive secular direct government aid to engage in discriminatory employment practices in connection with jobs that are directly attributable to that government aid would necessarily accomplish the same impermissible result.

⁶ A New York district court has reached the opposite conclusion. In *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 250-51 (S.D.N.Y. 2005), the court found that, even as applied to publicly funded jobs, Section 2000e-1 "remains a permissible accommodation of free exercise interests rather than an impermissible advancement of religion."

As the *Amos* court recognized, Section 2000e-1's religious exemption from Title VII's prohibition on religious discrimination in employment allows religious organizations to advance religion by hiring co-religionists to carry out the organizations' religious missions. 483 U.S. at 335; *see also* Amar & Brownstein, *supra*, at 3. While the exemption is, on its face, a constitutionally permissible accommodation of religion, its application to religious organizations' use of public funds to advance their religious missions by discriminating with respect to publicly funded positions crosses over into improper governmental religious advancement. *See* Amar & Brownstein, *supra*, at 4 (“[R]eligious organizations discriminate on the basis of religion in hiring staff in order to better define and advance their religious mission. . . . It is the reason why the Court upheld amendments to Title VII allowing religious organizations to engage in such discrimination with their own resources. But that is exactly what government grants of direct aid cannot be used to do without violating the Establishment Clause.”).

Amos's rationale further supports this conclusion. The *Amos* court approved Congress's enactment of a broad exemption allowing religious groups to engage in religious discrimination with respect to both religious and non-religious positions because the exemption obviated invasive judicial inquiries into whether particular jobs are or are not integral to a group's religious activities. *See Amos*, 483 U.S. at 336 (“[I]t 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 constitutional rule *amici* advance — which precludes religious organizations from engaging in religious discrimination for all government-funded jobs — likewise relieves both religious groups and governmental entities of the burden of needing to predict whether a position would be considered religious or secular. *See id.*; Rogers, *supra*, at 113 (“[I]t is clear that jobs subsidized by government grants and contracts must cover nonreligious duties, which cuts out the guesswork for the religious organization.”); Green, *supra*, at 54-55.

CONCLUSION

At a minimum, the substantial Establishment Clause issues that would be raised by allowing religious organizations to claim the Section 2000e-1 exemption in connection with publicly funded positions suggest the need to tread carefully. It is clear from the record that this case does not require the Court to engage or resolve those difficult constitutional issues, and the Court should make it unmistakably clear that it is neither reaching nor prejudging those issues in this case. Accordingly, irrespective of whether the Court grants Plaintiffs’ petition for rehearing *en banc*, *amici* respectfully request that the Court state that it is expressly reserving the question of whether Section 2000e-1 may be constitutionally applied to exempt religious organizations from Title VII’s prohibition on religious

discrimination in employment with respect to positions that are financed with government funds.

Dated this 17th day of September, 2010.

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