UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN COUNCIL OF THE BLIND, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	1:02CV00864 JR
	)	
PAUL H. O'NEILL, Secretary of the Treasury, et al.,	)	
	)	
Defendants.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Designing our national currency involves security considerations that are crucial to the national economy, and Congress has entrusted this function exclusively to the Secretary of the Treasury. Nevertheless, plaintiffs assert that the Rehabilitation Act of 1973 requires the United States to redesign its currency so that persons who are visually impaired can more easily distinguish among the denominations. The general provisions of the Rehabilitation Act cannot, however, override Congress's specific, express conferral of discretion upon the Secretary in making these technical design decisions in which security must be the paramount consideration.

Even if these security concerns, embodied in Congress's specific conferral of discretionary authority upon the Secretary, were not paramount, the Rehabilitation Act would not require redesigning the currency. Visually impaired persons have "meaningful access" to the use of the existing currency — they do, in fact, use it — which is all that the Act requires. See Alexander v. Choate, 469 U.S. 287, 302 (1985). The United States need not ensure that visually impaired persons can use the currency just as conveniently or cheaply as all other persons.

In any event, this action should also be dismissed because plaintiffs have failed to employ the administrative process for submitting claims under the Act to the Department of the Treasury. And finally, if this action were not, for some reason, dismissed in its entirety, two of plaintiffs' specific prayers for relief should be dismissed — that is, the request that the Court order a specific design for the currency and that the one-dollar bill be included in the redesign. Further, one of the defendants named in the Complaint — the Treasurer of the United States — should be dismissed as a party.

ARGUMENT

I. The Form of United States Currency Is Within the Specific, Express Statutory Discretion of the Secretary and Thus Cannot Be Subject to the More General Provisions of the Rehabilitation Act

Very few specific powers of the federal government are more central and critical to the function of the federal system than the design and production of our national currency. The Constitution specifically gives Congress the power "[t]o coin Money [and] regulate the Value thereof," and the Supreme Court has held that Congress is authorized to establish a national currency. See U.S. Const. art. I, sec. 8; Legal Tender Cases, 79 U.S. (12 Wall.) 457, 544-47 (1871). The strength and stability of the national economy depend, to a considerable extent, on the security and ready acceptance of our currency. See Levin v. Dare, 203 B.R. 137, 142 (S.D. Ind. 1996) (value of U.S. currency is based, in part, on "the relative difficulty of counterfeiting the currency").

In keeping with these priorities, Congress has specifically entrusted the Secretary of the Treasury with designing and producing currency "in the best manner to guard against counterfeits and fraudulent alterations." 12 U.S.C. § 418. Thus, the form of the currency "shall be . . . as directed by the Secretary of the Treasury." Id. These commands are expressly and specifically directed at one very discrete (and very crucial) governmental function, whereas the anti-discrimination provisions of the Rehabilitation Act apply very generally to a wide array of governmental conduct. If, as plaintiffs contend, the existing design of the U.S. currency violates the Rehabilitation Act, then the general anti-discrimination provisions of that Act are in conflict with Congress's more specific, express command regarding the design and production of

currency. Contra Memorandum in Opposition to Defendant's [sic] Motion to Dismiss 3-4 [hereinafter Pls' Opp.].

If the Secretary's discretion in this regard were subject to the Rehabilitation Act, then the "form and tenor" of the currency would be "as directed" by the courts and not as directed by the Secretary. But see 12 U.S.C. § 418. Moreover, the paramount consideration in the design of currency, as mandated by Congress, is its security. Subjecting the design and production of the currency to the Rehabilitation Act would subjugate that specific congressional priority to the general anti-discrimination provisions of the Rehabilitation Act, thus potentially reducing the security of the currency.

Furthermore, applying the Rehabilitation Act to the design and production of currency would require the courts to decide issues regarding its security. For example, the courts would have to decide whether changes allegedly mandated by the Rehabilitation Act would cause an unacceptable reduction in the security of the currency.[1] This would involve the courts in issues which are not only entrusted "solely" to the Secretary of the Treasury, but which are also not readily subject to judicial determination. See Complaint ¶ 22. Therefore, the two statutes are necessarily in conflict, and the general provisions of the Rehabilitation Act must yield to the more specific, express commands and purposes of Congress regarding the design and production of currency. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a

[1] These issues would be particularly numerous and difficult if, as plaintiffs urge, the courts were to determine and order the exact design of the currency rather than permitting the Secretary to determine an appropriate redesign after an adverse judgment regarding the existing currency's compliance with the Rehabilitation Act. See Complaint at 16-17.

commonplace of statutory construction that the specific governs the general."); Farmer v. Employment Security Commission, 4 F.3d 1274 (4th Cir. 1993).[2]

The Supreme Court's decision in Traynor v. Turnage, 485 U.S. 535 (1988), is not to the contrary. Contra Pls' Opp. at 2-3. The defendant in Traynor contended that judicial review of a regulation of the Veterans Administration was foreclosed by a statute barring judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans." 38 U.S.C. § 211(a). The Court rejected that contention. However, the decision was based, not on a determination that the statute was not sufficiently specific to override the Rehabilitation Act — the concept for which plaintiffs cite Traynor here — but on a finding that the language of the statute did not encompass the kind of agency action in question — that is, the promulgation of a regulation. See 485 U.S. at 541-45. Unlike the situation in Traynor, the more specific statute involved here — the Federal Reserve Act — undeniably applies to the design and production of currency; indeed, it is the statute that most directly and immediately governs that activity.

Finally, the Secretary's regulations implementing the Rehabilitation Act, 31 C.F.R. § 17.102, are also not to the contrary. Contra Pls' Opp. at 2. The language to which plaintiffs

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[2] Plaintiffs are incorrect in asserting that this argument was raised in defendants' motion for summary judgment and rejected by the Court's order denying that motion. See Pls' Opp. at 1. Defendants' motion for summary judgment described 12 U.S.C. § 418 and stated — as does plaintiffs' Complaint — that the design of currency is within the sole discretion of the Secretary. See Complaint ¶ 22. But that earlier motion did not assert, as defendants have now asserted in the present motion to dismiss, that § 418 overrides the anti-discrimination provisions of the Rehabilitation Act in this context. In any event, the Court's order regarding the summary judgment motion rested entirely on a finding that the record in this case was inadequate to determine whether the accommodations sought by plaintiffs would impose undue financial and administrative burdens. See Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979).

refer originated in prototype regulations prepared by the Department of Justice and distributed to the various federal agencies; and there is no indication that the Department of the Treasury considered every possible application of the regulation — or any particular application — before its promulgation. See 56 Fed. Reg. 40,781, 40,782 (Aug. 16, 1991) (Treasury notice of final rulemaking).[3] Thus, that language does not imply anything about the Secretary's "intent" in relation to the applicability or non-applicability of the Rehabilitation Act to the design and production of currency. Contra Pls' Opp. at 2. In any event, the regulations cannot override the contrary import of the Federal Reserve Act.

II. The Existing Currency Does Not Constitute "Discrimination" Against Visually-Impaired Persons

Even assuming that the Federal Reserve Act does not override the Rehabilitation Act in this special context, plaintiffs' claims should be dismissed because the existing currency does not violate the Rehabilitation Act. Plaintiffs do not attempt to controvert the assertions, in defendants' opening memorandum, that visually-impaired persons are not "excluded" from participation in currency-based transactions, that they are not entirely "denied the benefits" of

[3] Hence, the exact language to which plaintiffs refer in the Treasury regulations is found in the Rehabilitation Act regulations of numerous other federal agencies. Compare 31 C.F.R. § 17.102 with, e.g., 3 C.F.R. § 102.102 (Executive Office of the President); 5 C.F.R. § 1723.102 (OPM); 5 C.F.R. § 2416.102 (FLRA); 7 C.F.R. § 15e.102 (USDA); 14 C.F.R. § 1251.502 (NASA); 15 C.F.R. § 8c.2 (Department of Commerce); 24 C.F.R. § 9.102 (HUD); 32 C.F.R. § 1906.102 (CIA); 36 C.F.R. § 1208.102 (NARA); 38 C.F.R. § 15.102 (VA); 43 C.F.R. § 17.502 (Department of the Interior); 45 C.F.R. § 85.2 (HHS); 49 C.F.R. § 28.102 (Department of Transportation). Even the preamble to the Treasury regulations is nearly identical to the preambles of many other agency regulations. Compare 56 Fed. Reg. at 40,781 with 51 Fed. Reg. 4566 (Feb. 5, 1986) (various agencies), 52 Fed. Reg. 16,374 (May 5, 1987) (Architectural and Transportation Barriers Compliance Board), 52 Fed. Reg. 25,124 (July 2, 1987) (various agencies), 52 Fed. Reg. 45,619 (Dec. 1, 1987) (FTC), 52 Fed. Reg. 47,601 (Dec. 15, 1987) (Railroad Retirement Board).

using currency, and that the existing currency does not constitute intentional "discrimination" against the visually-impaired. See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 9-10 (quoting 29 U.S.C. § 794(a)) [hereinafter Defs' Memo.]. Nor do they attempt to controvert the principle that the Rehabilitation Act prohibits unintentional discrimination only where persons with disabilities are unable to "benefit meaningfully" from the governmental program or activity in question. See Alexander v. Choate, 469 U.S. 287, 302 (1985). Therefore, whether the existing currency violates the Rehabilitation Act depends on whether visually-impaired persons can "benefit meaningfully" from the use of the currency.

Plaintiffs' own allegations demonstrate that they can. Nowhere do the plaintiffs allege that they — or other visually-impaired persons — do not use United States currency. Indeed, the Complaint alleges, and plaintiffs' opposition memorandum emphasizes, that a visually-impaired person may rely upon "a trusted sighted individual" to fold each denomination in a unique way or may use a portable electronic device to distinguish among denominations, and that some persons who are visually-impaired can themselves distinguish among the denominations in certain lighting conditions. See Complaint ¶¶ 12, 13, 33; Pls' Opp. at 4-5. Plaintiffs contend that visually-impaired persons are "regularly" deceived by sighted individuals who misrepresent the denominations of currency, see id. at 5; but the Complaint contains no such allegation, and alleges simply that one of the plaintiffs "generally relies upon the store cashier to identify the denomination of each banknote handed to him." See Complaint ¶ 12. Plaintiffs also allege that the portable electronic devices available for distinguishing among denominations "usually" cost "approximately $300" and are "relatively slow." Id. ¶ 33.

The Rehabilitation Act does not, however, require the government to produce currency that visually-impaired persons can use just as conveniently, cheaply, and securely as sighted persons. The Supreme Court in Alexander v. Choate rejected the concept that the government must provide benefits "tailored" to the needs of beneficiaries with handicaps. 469 U.S. at 303. The Rehabilitation Act, said the Court, "seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. The Act does not, however, guarantee the handicapped equal results . . . ." Id. at 304 (citation omitted). As shown above, the visually impaired can and do participate in, and benefit from, the use of United States currency. The Secretary need not change the currency, in ways that would affect the lives of every American and of every person and entity that uses it throughout the world, in order to guarantee "equal results" in its use by those who are visually impaired.[4]

III. Plaintiffs Have Not Exhausted the Administrative Procedures Prerequisite to Seeking Judicial Relief

Plaintiffs cannot seriously contend that prudential exhaustion is not required in non-employment cases, like this one, under section 504 of the Rehabilitation Act.[5] 29 U.S.C. § 794.

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[4] Also in relation to the issue of "meaningful access," plaintiffs state that they are "unaware of any cases" supporting the distinction between governmental burdens and benefits described in defendants' opening memorandum. See Pls' Opp. at 5-6. That dichotomy, however, appears to be the determinative distinction between the Supreme Court's decision in Alexander and the appellate court decisions in Crowder v. Kitagawa and Randolph v. Rodgers, cited in defendants' memorandum. See Defs' Memo. at 12-13. Moreover, regardless of whether the issuance of currency could be called a "benefit," see Pls' Opp. at 6, it certainly differs materially from the governmental activities involved in Crowder and Randolph, where each of the defendants had imposed, upon the defendant's own initiative, a governmental barrier or burden.

[5] Defendants' exhaustion argument is contingent upon a finding that the design and (continued...)

See Darby v. Cisneros, 509 U.S. 137, 144 (1993); Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990) ("Exhaustion of administrative remedies is generally required before filing suit in federal court . . ."). The court in Poynter v. United States, cited in defendants' opening memorandum, expressly based its analysis on prudential concerns rather than on statutorily-mandated exhaustion. 55 F. Supp. 2d 558, 562-64 (W.D. La. 1999).[6] The plaintiffs, moreover, have been unable to cite any applicable authority to the contrary.

Further, plaintiffs' contention that exhaustion in this matter would be futile ignores the purposes of the exhaustion doctrine. The principal rationales for judicially-imposed exhaustion — allowing the agency "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision," Oglesby, 920 F.2d at 61 — are especially relevant here, given that the subject matter of the Complaint is uniquely within the expertise of the agency. Perhaps most importantly, an administrative complaint in this matter might have resulted in a "factual record" permitting the Court to determine, without discovery, that the changes sought by the plaintiffs would entail "undue financial and administrative burdens." Id.; Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979). "[F]airness to the agency and the orderliness of administrative practice and procedure" — also cited as reasons for

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[5](...continued)
production of currency are subject to the Rehabilitation Act and that plaintiffs have otherwise stated a cognizable claim. See Defs' Memo. at 15. The exhaustion argument does not undermine defendants' contention that the Secretary's discretion regarding the design of the currency overrides the Rehabilitation Act in this regard, nor does the argument regarding the Secretary's discretion undermine the exhaustion argument. Contra Pls' Opp. at 8.

[6] Although Poynter cited authority under section 501 in the course of reaching its conclusion, that fact does not undermine its persuasiveness as precedent regarding prudential exhaustion in section 504 cases. Contra Pls' Opp. at 7.

requiring exhaustion — are also particularly relevant here, given that the relief sought would have enormous fiscal and policy ramifications. See Leonard v. McKenzie, 869 F.2d 1558, 1563 (D.C. Cir. 1989).

In any event, plaintiffs' futility argument relies entirely on defendants' position in this litigation. Thus, any rationale for excusing plaintiffs' failure to pursue the administrative process would necessarily excuse exhaustion in every case where the plaintiff had purposefully bypassed such a process and the defendant later chose to defend on the merits. That, of course, is not the law. Plaintiffs' failure to exhaust warrants dismissal of this case.

IV. Two of Plaintiffs' Prayers for Relief Must Be Dismissed

If this case were not, for some reason, dismissed in its entirety, plaintiffs' request for an order requiring the inclusion of certain specific features in a redesign of the currency would have to be dismissed because the specifics of any redesign would be within the sole discretion of the Secretary; and plaintiffs' request for an order requiring a redesign of the one-dollar bill would have to be dismissed because Congress has expressly and specifically prohibited redesign of the one-dollar bill.

A. The Specific Nature of Any Redesign Would Be Within the Sole Discretion of the Secretary of the Treasury

Plaintiffs misread their own Complaint in asserting that they seek only "declaratory and injunctive relief requiring that the Secretary comply with Section 504 in the redesign process" and a review by the Court "to determine whether" the Secretary's intended redesign complies with the statute. See Pls' Opp. at 10-11. In reality, the Complaint seeks an order requiring

several very specific elements in a redesign of the currency. In their prayers for relief, plaintiffs request —

> a permanent injunction requiring that banknotes be designed to incorporate features which would make them accessible to people with visual disabilities, including but not limited to:
>
> (1) a low vision feature involving a single denomination numeral which is at least one half the size of banknote height, and is printed with black ink on a white surface so as to increase contrast levels;
>
> (2) denomination numerals indicated by Braille symbols and raised printing on the banknote itself.
>
> (3) varying the length, height, and color of banknotes by denomination.

See Complaint at 16-17.

Granting this request would involve the Court intimately in the redesign process. If this relief were granted, the Court would have to consider and approve (or disapprove), among other things, the color of the ink to be used for the "single denomination numeral," the color of the background surrounding the numeral, the degree of contrast between the numeral and the background, the degree to which the denomination numerals were "raised," and the degree to which the length, height, and color of each denomination "varied" from the length, height, and color of every other denomination. All of these determinations would involve the Court in complex factual questions regarding the expense of producing the notes as redesigned by the Secretary, the expense and technical feasibility of any changes to that redesign that the Court may find necessary, and the durability of the resulting re-redesign. Thus, granting the relief requested would violate Congress's directive that — as plaintiffs have acknowledged — the design of

United States currency is "solely within the discretion of the Secretary of the Treasury." Id. ¶ 22; see 12 U.S.C. § 418.

B. Congress Has Specifically and Expressly Prohibited Any Redesign of the One-Dollar Bill

Despite undeniably clear and binding law to the contrary, plaintiff continues to insist that the one-dollar bill must be included in any redesign of the currency. The current-year appropriations act for the Department of the Treasury provides that "[n]one of the funds appropriated [therein] or otherwise available to the Department of the Treasury or the Bureau of Engraving and Printing may be used to redesign the $1 Federal Reserve note." See Pub. L. No. 108-7, § 117, 117 Stat 11, 439 (2003). Identical language has appeared in the three immediately preceding appropriations acts. See Pub. L. No. 107-67, § 117, 115 Stat. 514, 525 (2001); Pub. L. No. 106-554, § 117, 114 Stat. 2763 (2000); Pub. L. No. 106-58, § 117, 113 Stat. 430, 441 (1999). Therefore, regardless of any contrary language in a 1999 committee report — not enacted into law — the Secretary is prohibited from redesigning the one-dollar bill. Contra Pls' Opp. at 9-10.

V. The Treasurer of the United States Should Be Dismissed as a Defendant

Plaintiffs have not responded to defendants' contention that the Treasurer of the United States is not a proper party in this action. Therefore, the Treasurer should be dismissed as a defendant, not only because she is not a proper defendant, but also because of plaintiffs' failure to respond. See Local Rule 7.1(b) (in absence of opposition, Court may treat motion as conceded).

CONCLUSION

For the foregoing reasons, as well as those set forth in defendants' opening memorandum, this action should be dismissed with prejudice in its entirety.

Dated: September 10, 2003

Respectfully submitted,

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