UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN COUNCIL OF THE BLIND, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	1:02CV00864 JR
	)	
JOHN W. SNOW, Secretary of the Treasury,	)	
	)	
Defendant.	)	
	)	

RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

1. The regulation cited by the plaintiffs (docket #68) does not compel the Secretary of the Treasury to provide a currency reader to all blind and visually-impaired persons in the United States, for at least the following reasons:

a. The regulation referred to is part of a set of generic regulations enacted word-for-word by literally dozens of federal agencies; indeed, the precise language about "auxiliary aids" on which plaintiffs rely is found in the regulations of numerous other federal agencies. Compare 31 C.F.R. § 17.160(a)(1) (Department of the Treasury) with, e.g., 3 C.F.R. § 102.160(a)(1) (Executive Office of the President); 5 C.F.R. § 1207.160(a)(1) (MSPB); 5 C.F.R. § 2416.160(a)(1) (FLRA); 7 C.F.R. § 15e.160(a)(1) (USDA); 14 C.F.R. § 1251.560(a)(1) (NASA); 15 C.F.R. § 8c.60(a)(1) (Department of Commerce); 24 C.F.R. § 9.160(a)(1) (HUD); 32 C.F.R. § 1906.160(a)(1) (CIA); 36 C.F.R. § 1208.160(a)(1) (NARA); 38 C.F.R. § 15.160(a)(1) (VA); 43 C.F.R. § 17.560(a)(1) (Department of the Interior); 49 C.F.R.

§ 28.160(a)(1) (Department of Transportation).[1] This regulation was not, therefore, crafted in light of the unique responsibilities of the Bureau of Engraving and Printing.

b. Perhaps most significantly, the regulation's heading reads "Communications," and its opening language says, "The agency shall take appropriate steps to effectively communicate with applicants, participants, personnel of other Federal entities, and members of the public." 31 C.F.R. § 17.160(a). The regulation further reiterates that the agency shall use "telecommunication devices for deaf persons" where it chooses to "communicate[ ] with applicants and beneficiaries by telephone." Id. § 17.160(a)(2). The section-by-section analysis of the regulation in the Federal Register also reflects that focus. See 56 Fed. Reg. 40,781, 40,787 (Aug. 16, 1991) ("Section 17.160 requires that the agency take appropriate steps to effectively communicate with personnel of other Federal entities, applicants, participants, and members of the public."). Effective "communication" with a handicapped person is, therefore, the apparent purpose of this regulation, and the purpose of providing "auxiliary aids where necessary." The provision of a currency reader could not, by any stretch of the imagination, be characterized as furthering "effective[ ] communication" by the agency with the public.

c. The regulation speaks of assisting "an individual with handicaps," and calls for the agency to "give primary consideration to the requests of the individual with handicaps" in determining what type of aid is needed. 31 C.F.R. § 17.160(a)(1), (a)(1)(i). Thus, the regulation apparently contemplates providing assistance on an individual, case-by-case basis, and should

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[1] Even the preamble to the Treasury regulations is nearly identical to the preambles of many other agency regulations. Compare 56 Fed. Reg. 40,781 (Aug. 16, 1991) 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).

not be read as requiring the Secretary of the Treasury to provide a device, en masse, to any of the approximately 1,000,000 blind persons in the United States who could request it, or to any of the multiple millions of other visually-impaired persons.

d. A currency reader would constitute a "reader[ ] for personal use," which the regulation does not require. Id. § 17.160(a)(1)(ii). This exclusion reflects the purpose of the regulation, as stated in the section heading: the Secretary may need to provide an auxiliary aid for a person with handicaps to receive "communications" from the Secretary, for temporary use at the time of the communication, but he need not provide devices for "personal use," to become the recipient's exclusive possession.

e. Requiring the Secretary to provide "auxiliary aids" for the denomination of currency by the visually impaired would impose "undue financial and administrative burdens." See id. § 17.160(d). Plaintiffs' estimate of the cost of providing currency readers assumes (1) that only blind persons, and not other visually-impaired persons, would be able to request them, and (2) that the Secretary's effort to foster the development of a reader at a cost of $35 apiece will be successful. The Secretary's overall financial burden would be substantially greater if visually-impaired persons were permitted to request a reader, or if the ultimate commercial price of the new reader turns out to be higher. Additionally, plaintiffs' argument ignores the "administrative burdens" of carrying out a program to acquire and distribute free currency readers. The Secretary would be required, among other things, to verify the eligibility of each recipient (presumably

through the examination of medical records), and to ensure, by maintaining a database of recipients, that no requestor had already received a reader.[2]

2. Besides addressing the regulation as directed by the Court, plaintiffs submit additional argument regarding the sovereign immunity issue raised in defendant's dispositive motion. The case they cite, Redd v. Summers, 232 F.3d 933 (D.C. Cir. 2000), does not, however, stand for the proposition that the United States has waived sovereign immunity for claims of the kind made here. First, as plaintiffs acknowledge, waiver of sovereign immunity for injunctive and declaratory relief under Section 504 was not raised or addressed in Redd.[3] The government may not waive jurisdictional defects, and the fact that a court addressed the merits of a case without considering jurisdictional issues does not mean that the court had jurisdiction; nor does it confer jurisdiction on lower courts in any similar cases. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 119 & n.29 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (quoting Hagans v. Lavine, 415 U.S. 528, 533, n.5 (1974)); Zambrano v. Reinert, 291 F.3d 964, 975 (7th Cir. 2002) ("Jurisdictional questions lurking in the record, but unmentioned by a court, remain open to decision."). Second, the plaintiff in Redd was obviously challenging a "discrete agency action" — the decision to ask

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[2] Even if this regulation could somehow be seen as applying here, plaintiffs do not allege that they have made the specific requests contemplated by the regulation, so that the Court would lack jurisdiction to consider any claim thereunder because of plaintiffs' failure to exhaust administrative remedies.

[3] Sovereign immunity was mentioned in an earlier opinion by the district court, Redd v. Rubin, 34 F. Supp. 2d 1 (D.D.C. 1998), but not in relation to the waiver of sovereign immunity for injunctive or declaratory relief under Section 504. Id. at 4, 8. That opinion was not, incidentally, the one under appeal in the D.C. Cir. decision cited above.

her employer to dismiss her — rather than an entire program, as plaintiffs seek to do here. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). Thus, the Redd decisions do not help the plaintiffs' case here.

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Respectfully submitted,

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