UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES REGARDING FINAL ORDER AND JUDGMENT

INTRODUCTION

The Department of the Treasury ("Department") has already started complying with the declaration of this Court that blind and other visually impaired persons presently lack meaningful access to United States currency under the Rehabilitation Act. Indeed, this process began several months before issuance of the D.C. Circuit's decision in this action. See Declaration of Larry R. Felix, Director of the Bureau of Engraving and Printing ¶ 3 [80-2]. The Bureau of Engraving and Printing awarded a contract, in January 2008, for a comprehensive study to assess the needs and abilities of blind and other visually impaired persons, to examine the methods available for providing meaningful access to currency, and to analyze those alternatives in relation to the Bureau's manufacturing process. Id. ¶¶ 6-13. The Department intends to review the results of the Contractor Study, seek public comments on tentative recommendations for providing meaningful access, and ultimately select a method or methods that best meet that objective without undermining the requirements to guard against counterfeiting and to ensure that United States

currency remains a reliable, durable, and usable medium of exchange for the public. Id. ¶¶ 14-18.

Because the Department is already actively engaged in complying with the Court's declaratory judgment, injunctive relief would be unnecessary and inappropriate here. As the Supreme Court has observed, a court should exercise its discretion to withhold injunctive relief where it can be "assume[d] that the [government will] proceed appropriately without the coercion of a court order when finally advised by the courts" that its conduct is contrary to law. See Dunlop v. Bachowski, 421 U.S. 560, 575-76 (1975). Indeed, where a matter is statutorily committed to an agency, the usual judicial remedy is simply to remand to the agency for corrective action. See INS v. Orlando Ventura, 537 U.S. 12, 16-17 (2002). Further, where, as here, the injunctive relief would be mandatory — as would plaintiffs' proposed order requiring defendant to "bring currency into compliance" with the Rehabilitation Act — such relief should not be entered without meeting the high standards for mandamus relief. The Department of the Treasury has no objection to an order confirming the Court's declaratory judgment and requiring regular submission of reports regarding the progress in complying with the declaration, but submits that the Court should decline to enter an injunction requiring the Department to do what it is already doing. A requirement for submission of status reports makes an injunction, at this stage of the litigation, even more unnecessary.

Because injunctive relief is neither necessary nor appropriate here, defendant submits herewith a proposed Order and Judgment (Attachment 1), which requires only that the defendant report on progress in providing meaningful access to the currency. In the alternative, should the Court determine to issue an injunction, defendant respectfully submits an alternative proposed

Order and Judgment (Attachment 2), which is consistent with the Court's statements at the status conference of September 4, 2008. Part I below explains further why the Court should decline to enter an injunction requiring the defendant to comply with the declaratory judgment in this action. Part II explains some of the provisions in the alternative proposed Order and Judgment, should the Court determine to issue injunctive relief. Part III explains why the Court should not adopt certain provisions of the Order proposed by the plaintiffs.[1]

ARGUMENT

I. An Injunction Is Unnecessary Here and Thus Equitably Inappropriate

An "injunction is inherently an equitable remedy," subject to "equitable principles." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 n.1 (2002); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393 (2006). Thus, "the decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." Id. at 391. An injunction does not "automatically" follow upon a determination that the law has been infringed. Id. at 392-93.

A plaintiff seeking a permanent injunction must establish, among other things, "that without injunctive relief [it] will suffer irreparable harm." FCE Benefit Adm'rs, Inc. v. George Washington Univ., 209 F. Supp. 2d 232, 243-44 (D.D.C. 2002). Moreover, if a declaratory judgment is sufficient to remedy the harm complained of, an injunction is unnecessary. See Alcorn v. Wolfe, 827 F. Supp. 47, 53-54 (D.D.C. 1993) (denying injunctive relief in light of

[1] The parties have conferred in an attempt to prepare a joint proposed order. They were unable to reach agreement on a joint order, but were able to agree on the language of paragraphs 5, 6, and 8 in Attachment 2 hereto, which correspond to paragraphs 6, 7, and 9 in plaintiffs' proposed Order.

defendant's "unequivocal guarantee" that he would abide by declaratory judgment). Where plaintiff's interests can be protected by a declaratory judgment, "the stronger injunctive medicine will be unnecessary." Wooley v. Maynard, 430 U.S. 705, 711 (1977); see Dunlop v. Bachowski, 421 U.S. 560, 575-76 (1975) (stating that injunctive relief would be inappropriate in light of assumption "that the Secretary would proceed appropriately without the coercion of a court order when finally advised by the courts that his decision was in law arbitrary and capricious"); Roe v. Wade, 410 U.S. 113, 166 (1973) (finding it "unnecessary" to consider injunctive relief, based on assumption that defendant would "give full credence" to declaratory judgment); Grandco Corp. v. Rochford, 536 F.2d 197, 208 (7th Cir. 1976) (vacating district court's entry of injunction where court was "persuaded that the declaratory remedy is sufficient in itself in the context of this case"). Even where an agency has acted unconstitutionally, the court "should proceed cautiously and incrementally in ordering remediation so as not to assume the role of [government] administrators." See Taylor v. Freeman, 34 F.3d 266, 269 (4th Cir. 1994). Even in that context, "intrusive and far-reaching federal judicial intervention . . . is justifiable only where [agency] officials have been afforded the opportunity to correct constitutional infirmities and have abdicated their responsibility to do so." Id. (emphasis added).

Under these principles, this Court should exercise its discretion to decline to enter an injunction requiring the Department of the Treasury to provide meaningful access to the currency for blind and other visually impaired persons. As detailed in the Declaration of Larry R. Felix, Director of the Bureau of Engraving and Printing, submitted on August 29, 2008 [80-2], the Department has already begun the process of determining how to provide such meaningful

access. The defendant is committed to carrying this process to completion and to taking appropriate action at the end of the process (Declaration, paragraph 3).

The record demonstrates that the Department of the Treasury is "giv[ing] full credence" to this Court's declaratory judgment and is "proceed[ing] appropriately without the coercion of a court order." See Roe, 410 U.S. at 166; Dunlop, 421 U.S. at 575-76. Moreover, the regular submission of status reports regarding the ongoing process of providing meaningful access to U.S. currency will allow the Court to ensure that the Department continues to make progress toward that end. Under these circumstances, plaintiffs cannot show "that without injunctive relief [they] will suffer irreparable harm." FCE Benefit Adm'rs, Inc., 209 F. Supp. 2d at 243-44. Issuing an injunction requiring the Department to do what it is already doing would not be consistent with the equitable principles governing the issuance of such relief.

Furthermore, Congress has expressly committed the design of United States currency to the Secretary of the Treasury, rendering an injunction particularly inappropriate. See 12 U.S.C. § 418. Where a matter is statutorily committed to an agency, the usual judicial remedy is simply to remand to the agency for corrective action. See INS v. Orlando Ventura, 537 U.S. 12, 16-17 (2002). The Supreme Court has directed that courts "should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. . . . The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination . . . ." Id. "[W]hen an agency committing an error of law has discretion to determine in the first instance how it should be rectified, the proper course is to remand the case for further agency consideration in harmony with the court's holding." Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986); see PPG Indus., Inc. v. United States, 52 F.3d

363, 365-66 (D.C. Cir. 1995) ("[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards."). In this case, the "form and tenor" of United States currency are statutorily committed to the Secretary's discretion, see 12 U.S.C. § 418, such that the matter at hand has been "place[d] primarily in agency hands" — that is, in the hands of the defendant. See Orlando Ventura, 537 U.S. at 16-17.

An injunction here would be even more inappropriate if it incorporated plaintiffs' proposed language mandating that the Department of the Treasury take "such measures as are required to bring currency into compliance with Section 504 of the Rehabilitation Act." A request for an injunction must be "analyzed as one requesting mandamus" if "a mandatory injunction [is sought] against a federal official." National Wildlife Fed'n v. United States, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980); see In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005); Swan v. Clinton, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996). The "drastic" remedy of mandamus is warranted only "where a public official has violated a 'ministerial' duty" — that is, one that "admits of no discretion." See Consolidated Edison Co. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002). The "distinction between discretionary and ministerial duties" is "critical . . . because the courts do not have authority under the mandamus statute to order any governmental official to perform a discretionary duty." Swan, 100 F.3d at 977.

As this Court has recognized, the defendant has substantial discretion to determine the most appropriate method for providing meaningful access for blind and other visually impaired persons to American currency. See American Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 62 (D.D.C. 2006) (The Court "has neither the expertise, nor . . . the power, to choose among

the feasible alternatives, approve any specific design change, or otherwise to dictate to the Secretary of the Treasury how he can come into compliance with the law."); see also American Council of the Blind v. Paulson, 525 F.3d 1256, 1273 (D.C. Cir. 2008) (referring to "the Secretary's broad discretion to determine how to come into compliance with section 504"). The language proposed by plaintiffs — which purports to require the Department to "bring currency into compliance with Section 504" — limits defendant's discretion in a way that goes beyond what the Rehabilitation Act mandates by requiring a change in the currency and implicitly foreclosing the use of currency readers as a means of providing meaningful access for blind and other visually impaired persons. See Transcript of Status Conference at 23 (Sept. 4, 2008). Such a constraint on the defendant's lawful discretion plainly cannot be characterized as compelling the performance of a "ministerial duty," and consequently runs afoul of the standards applicable to requests for relief in the nature of mandamus.

For all of these reasons, defendant submits that the Court should limit relief to the declaratory judgment and reporting provision embodied in the proposed Order and Judgment submitted as Attachment 1 hereto.

II. If the Court Determines that Injunctive Relief Is Necessary, the Order and Judgment Submitted Herewith Meets the Court's Requirements

The proposed Order and Judgment submitted herewith as Attachment 2 implements the views stated by the Court during the status conference of September 4, 2008.

As requested by the Court, this Order and Judgment would require the Department of the Treasury, without unreasonable delay, to take such steps as may be required to provide meaningful access to currency for blind and other visually impaired persons before the next redesign of

each denomination of currency. This does not mean, however, that redesigning the currency will necessarily be chosen as the means to comply with the Court's declaratory judgment. As explained during the status conference and as reflected in the Declaration of Larry R. Felix, the Department is, at this point in the process, considering all potential methods of providing meaningful access to the currency — including electronic currency readers, which the D.C. Circuit's decision in this case recognized might permissibly be relied on to satisfy defendant's obligation. American Council of the Blind, 525 F.3d at 1270-71.

The proposed Order and Judgment at Attachment 2 also recognizes a few exceptions to this general directive, most of which were discussed during the recent status conference (paragraphs 3 through 6). First, because the Department of the Treasury intends to unveil shortly the new $100 note, which has already been redesigned, the Court acknowledged that the defendant would not have to come into compliance with regard to this denomination until its next redesign.[2] See Transcript of Status Conference at 16 (Sept. 4, 2008). Second, the $1 note would not be affected by the Order and Judgment, since the Department is legislatively prohibited from modifying the $1 note and plaintiffs have expressly eschewed any attempt to compel such a redesign through this action. See American Council of the Blind, 525 F.3d at 1275 n.3 ("Congress has prohibited the Treasury from redesigning the $1 bill, which is why the Council does not seek to change its size."); see also Pub. L. No. 110-161, § 113, 121 Stat. 1844, 1978 (2007) (making appropriations "for the fiscal year ending September 30, 2008"); Plaintiffs' Motion for Summary Judgment [35], Attachment 1 ("nothing herein shall require redesign of the

[2] See http://www.moneyfactory.gov/newmoney/ ("The $100 bill is the next denomination slated for a new design, after the $5 bill. An official introduction date has not been set.").

$1 note"). Third, the Department would not be prohibited from changing the Series year or the signatures of the Secretary of the Treasury or of the Treasurer of the United States on each note, nor from changing machine-readable features that are not visible to the naked eye.

Fourth, under the Order and Judgment at Attachment 2, the Department of the Treasury would be permitted to redesign any denomination without fully providing meaningful access in relation to that denomination, upon a written determination by the Director of the Bureau of Engraving and Printing that such redesign is urgently needed to counter a threat or threats of counterfeiting, or that it will improve access to the currency by blind or other visually impaired persons. As discussed during the September 4 status conference, counterfeiting threats occasionally arise that must be responded to without delay. The last portion of this exception — referring to improving access by blind and other visually impaired persons — would permit making incremental improvements to that end, such as placing on all denominations the large numeral currently found on the $5 note.

Fifth, both proposed orders submitted herewith provide that the first semiannual report of defendant's progress would be due no later than March 16, 2009 — that is, approximately two weeks after the report of the Contractor Study is currently due for submission to the Bureau of Engraving and Printing. The semiannual frequency of reporting is based on the Court's statements during the status conference. See Transcript of Status Conference at 16 (Sept. 4, 2008) ("I think 180-day reporting probably makes more sense, and we'll get a better sense of movement in 180 days than we would every 90 days.").

III. Several Aspects of Plaintiffs' Proposed Order Should Not Be Adopted by This Court

In contrast to defendant's proposed orders, the Order submitted by the plaintiffs contains provisions or language that would be inappropriate for this case.[3]

Paragraph 1 of plaintiffs' proposal states that the defendant shall "bring currency into compliance" with the Rehabilitation Act. This reference to "bring[ing] currency into compliance" impliedly forecloses relying on electronic currency readers to provide meaningful access, contrary to the appellate court's observation that a certain statement by this Court was "not fairly read as foreclosing reliance on technological auxiliary aids, such as a portable currency reader. Courts have held," the Court of Appeals continued, "that government-provided interpretive services can provide meaningful access to the disabled, although there is no occasion for us to address whether inexpensive, commercially provided auxiliary aids could satisfy the Secretary's statutory obligation to ensure meaningful access [to the currency]." American Council of the Blind, 525 F.3d 1270-71 (citations and footnote omitted).

In paragraph 2, plaintiffs' proposed Order states that the defendant shall "implement accommodations" to provide meaningful access to the currency "pursuant to the next scheduled currency redesign." Plaintiffs' reference to the "next scheduled" redesign reflects a misunderstanding of the process of updating currency to incorporate anti-counterfeiting features. Although the Department of the Treasury's goal is to redesign each denomination every seven to ten years for that purpose, see Transcript of Status Conference at 10 (Sept. 4, 2008), the redesigns

[3] Defendant was served with plaintiffs' proposed Order on the afternoon of September 15, 2008.

are not on any precise "schedule." This aspect of plaintiffs' proposed Order would not, therefore, correspond to the facts.[4]

Paragraph 5 of plaintiffs' proposal differs significantly from paragraph 4 of the proposed Order and Judgment submitted by defendant as Attachment 2 hereto.[5] First, plaintiffs would require that a redesign to address a counterfeiting threat be made only if the redesign were needed "immediately," whereas defendant's proposal would permit such a redesign if needed "urgently." Given that a redesign of currency requires some time — as amply shown by the evidence in this case — it makes little sense to speak of an "immediate" redesign. Second, plaintiffs' proposal calls for the Secretary of the Treasury or the Deputy Secretary, rather than the Director of the Bureau of Engraving and Printing ("BEP"), to make the written determination referred to. By its nature, a determination that a redesign of currency is urgently needed must be made without unnecessary delay. Since a determination by the Secretary or Deputy Secretary would require an additional administrative step and thus more time, requiring the Director to make the determination would be more appropriate and would fully protect plaintiffs' interests. Additionally, the Secretary has delegated to the BEP his authority to produce currency, and there is no basis for ignoring that delegation here.

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[4] Additionally, plaintiffs' paragraph 2 would impose an obligation on the defendant to implement "accommodations," a term which is used only in Subchapter I of the Americans with Disabilities Act, see 42 U.S.C. §§ 12111(9), 12112(b)(5), which governs employment discrimination and has no bearing on this case.

[5] The Department of the Treasury will address paragraph 3 of plaintiffs' proposed Order in its forthcoming response to plaintiffs' motion requiring defendant to "mitigate" certain alleged "deficiencies."

Third, plaintiffs seek to require that the written determination regarding a counterfeiting threat be filed with the Court. Any such determination would be highly sensitive, in that it would deal with counterfeiting threats, particularly threats that must be addressed urgently. Accordingly, any corresponding filing either would have to be extremely vague and uninformative, or would need to be filed under seal and ex parte.

Fourth, plaintiffs' paragraph 5 omits the language, from defendant's paragraph 4, that an interim redesign may be made upon a written determination that it "will improve access to the currency by blind or other visually impaired persons." As noted above in discussing the proposed Order and Judgment submitted as defendant's Attachment 2, this language would permit incremental improvements to that end, short of fully providing meaningful access, such as placing on all denominations the large numeral currently found on the $5 note. It is difficult to understand why plaintiffs would object to this provision. Without it, the Department of the Treasury would not be permitted to make even small changes in the currency beneficial to blind and other visually impaired persons until the next currency redesign is approved.[6]

In paragraph 8, plaintiffs propose language providing that "[t]he Court shall consider comments from the public in connection" with any of the semiannual status reports filed by the defendant. This language would risk involving any number of public commenters — and, indirectly, the Court — in micromanaging the Currency Accessibility Process. Receiving and considering public comments in this context would impose an inappropriate and unnecessary

[6] Plaintiffs' paragraph 4 says that the defendant "is currently engaged in redesigning the $100 note," whereas paragraph 3 in defendant's Attachment 2 says he "is currently engaged in implementing a redesign of the $100 note." Defendant's language more accurately reflects the current stage of this redesign.

burden on this Court, beyond the scope of its functions under Article III of the Constitution. Although the Department of the Treasury intends to seek public comments after analyzing the results of the Contractor Study and publishing its tentative recommendations, entertaining public comments before that point — especially comments to be filed with the Court — would delay, disrupt, and interfere with the Currency Accessibility Process.

CONCLUSION

For the foregoing reasons, this Court should enter the proposed Order and Judgment submitted as Attachment 1 hereto, exercising its discretion to decline to enter an injunction requiring the Department of the Treasury to provide meaningful access to United States currency for blind and other visually impaired persons. To the extent the Court determines to enter injunctive relief, the Court should enter the proposed Order and Judgment submitted herewith as Attachment 2.

Dated: September 15, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	:	
	:	Civil Action No.
v.	:	1:02CV00864 JR
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Defendant.	:	

ORDER AND JUDGMENT

The United States Court of Appeals for the District of Columbia Circuit having affirmed this Court's Memorandum Order (Amended) of December 1, 2006 [72], the Court now enters the following Order and Judgment:

1. **IT IS HEREBY ORDERED AND ADJUDGED** that the defendant has violated Section 504 of the Rehabilitation Act by failing to provide meaningful access to United States currency for blind and other visually impaired persons.

2. **IT IS FURTHER ORDERED** that the defendant shall file a status report describing the steps taken during the reporting period to implement this Order and Judgment. The first such status report shall be filed no later than March 16, 2009, and each succeeding report shall be filed every 6 months thereafter, until the defendant has fully complied with this Order and Judgment.

3. **IT IS FURTHER ORDERED** that the parties shall confer and attempt to reach agreement regarding plaintiffs' claim for attorney's fees and costs. Plaintiffs shall submit their application for attorney's fees and costs in pursuing this action within 60 days of the date of this Order and Judgment.

SO ORDERED.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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1. **IT IS HEREBY ORDERED AND ADJUDGED** that the defendant has violated Section 504 of the Rehabilitation Act by failing to provide meaningful access to United States currency for blind and other visually impaired persons.

2. **IT IS FURTHER ORDERED** that, subject to the other provisions of this Order and Judgment, defendant shall, without unreasonable delay, take such steps as may be required to provide meaningful access to United States currency for blind and other visually impaired persons, which steps shall be completed, in connection with each denomination of currency, not later than the date when a redesign of that denomination is next approved by the

Secretary of the Treasury after the entry of this Order and Judgment.

3. Notwithstanding paragraph 2 above, **IT IS FURTHER ORDERED** that, given that the defendant is currently engaged in implementing a redesign of the $100 note ("the NextGen $100"), the defendant need not comply with paragraph 2 above in connection with the NextGen $100 note until the date when another redesign of such denomination is next approved by the Secretary of the Treasury after the redesign that is currently in progress.

4. **IT IS FURTHER ORDERED** that the defendant may, notwithstanding paragraph 2 above, issue a redesign of any denomination of currency before defendant has fully complied with paragraph 2 above, upon a written determination by the Director of the Bureau of Engraving and Printing that such redesign is urgently needed to counter a threat or threats of counterfeiting, or will improve access to the currency by blind or other visually impaired persons.

5. **IT IS FURTHER ORDERED**, notwithstanding paragraph 2 above, that this Order and Judgment does not apply to the one dollar ($1) note, and does not require the defendant to make any changes to the one dollar ($1) note.

6. **IT IS FURTHER ORDERED**, notwithstanding paragraph 2 above, that this Order and Judgment does not apply to changing the Series year or the signatures of the Secretary of the

Treasury or of the Treasurer of the United States on each note, nor to changing the machine-readable features on the notes that are not visible to the naked eye.

7. **IT IS FURTHER ORDERED** that the defendant shall file status reports describing the steps taken during the reporting period to implement this Order and Judgment. The first such status report shall be filed no later than March 16, 2009, and each succeeding report shall be filed every 6 months thereafter, until the defendant has fully complied with this Order and Judgment.

8. **IT IS FURTHER ORDERED** that the parties shall confer and attempt to reach agreement regarding plaintiffs' claim for attorney's fees and costs. Plaintiffs shall submit their application for attorney's fees and costs in pursuing this action within 60 days of the date of this Order and Judgment.

SO ORDERED.

JAMES ROBERTSON
United States District Judge