No. 07-4322

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDEN BOWMAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiff–Appellant
Urging Reversal

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, The National Legal Foundation makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? **NO**.

/s/ Steven W. Fitschen December 20, 2007
Steven W. Fitschen

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c) (3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF, as a public interest law firm, has an interest, on behalf of its constituents and supporters, in arguing on behalf of people of faith. The NLF believes that the Department of Defense should not discriminate against people of faith as the Government has in the distribution of employee benefits, especially when Congress has indicated no desire to do so.

This brief is filed pursuant to consent of both parties.

SUMMARY OF THE ARGUMENT

This Brief makes two arguments not made by the party it supports, Mr. Bowman. First, *Amicus* demonstrates that the legislative history of the Act shows that Congress's primary purposes in the Act was reducing the number of military forces and providing incentives to encourage servicemen and women (hereinafter "service personnel" or "personnel") to take early retirement. Thus, the Court below erred when it claimed that Congress did not intend to benefit the veterans. Second, *Amicus* argues that the Secretary of Defense acted *ultra vires* in

promulgating a regulation that restricts the statute in a manner that Congress did not intend.

As to the first argument, when Congress enacted the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992, it included a section to encourage post-separation public and community service. The District Court erred when it held that Congress's main intent was to aid the public and community service. Throughout the National Defense Authorization Act for Fiscal Year 1993, Congress discussed how it intended to reduce the size of the military forces in the post-Cold War world. For service personnel who had fifteen to twenty years of service, Congress decided to provide incentives to elect early retirement. One of these incentives was to continue accruing service time credit up to twenty years, for full retirement benefits, by working for public and community service organizations. Since Congress was primarily focused on reducing the size of the military forces and providing personnel with benefits to encourage them to retire, its main purpose was not to aid the public service organizations themselves.

As to the second argument, the District Court should be reversed because the Secretary of Defense's regulation was *ultra vires* since it exceeded his statutory authority. Under the Administrative Procedure Act, a court is required to hold a regulation invalid, when, as here, the agency has exceeded its authority in promulgating the regulation. The Secretary exceeded his authority by restricting

the number of organizations that former service personnel could work for under the statute in a way that Congress did not intend. The Secretary's concern about some putative conflict with the Establishment Clause would not give him the authority to amend the statute. While Congress passed the statute with an enumerated list of types of organizations, it also included a catch-all clause for any public or community service organization, showing its intent for the statute to be widely available within those parameters. Thus, the District Court erred when it held that the regulation was permitted by the statute.

ARGUMENT

I. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE THE LEGISLATIVE HISTORY OF 10 U.S.C. 1143a SHOWS THAT CONGRESS'S PRIMARY PURPOSE WAS REDUCING THE MILITARY FORCES AND ENCOURAGING EARLY RETIREMENT.

Congress enacted 10 U.S.C. § 1143a (2006) entitled "Encouragement of Postseparation Public and Community Service" (hereinafter "the Statute") as a section of the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992 (hereinafter "the Act"), which was Division D of the National Defense Authorization Act for Fiscal Year 1993. Pub. L. 102-484. At the beginning of the Division, which became the Act, Congress made numerous findings of fact. Pub. L. 102-484 § 4101. Pertinent here, Congress concluded that, with the fall of communism, the United States had an opportunity to reassess the military threat

against it unlike any other opportunity since World War II. *Id.* Congress further concluded that with the reduced threat to the country it could "restructure and reduce the military requirements of the United States." *Id.* Congress found that the best way to implement a structured reduction of the military would be to pass the Act, providing for a variety of programs and benefits to encourage and aid former military personnel to reenter the civilian world. *Id.* When the Senate Committee on Armed Services presented the bill to the full Senate with its recommendation, the chairman of the Committee, Senator Nunn, summarized the numerous initiatives that the Committee had included in the Act. 138 Cong. Rec. S11,855-57 (daily ed. Aug. 5, 1992) (statement of Sen. Nunn).

Introducing the Act, Senator Nunn discussed a number of proposals that he had advocated to provide for early retirement after fifteen years of service with the incentive to continue accruing five additional years of retirement credit. *Id.* He noted that these proposals were crucial because, even though the military had a large number of personnel, "the Defense Department and the services are, understandably, very reluctant when someone has 15 years in but not 20 years, for that person to be forced out, or involuntarily retired." *Id.* at S11,856. One of these proposals that Senator Nunn had advocated was the Statute, which allows early retirees to continue to earn retirement credits through work with public and community service organization. *Id.* Senator Nunn emphasized that this would

save the taxpayers money because the service personnel who elected to take early retirement would not be on the active duty payroll, but rather would receive retirement benefits in the future. *Id.*

The Senate Committee on Armed Services recommended the Act to the full Senate because of the planned reduction in armed forces and "the absence of an effective tool . . . to reduce the 15 to 20-year element of the personnel inventory." U.S. Senate Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1993, S. Rep. No. 102-352. The Committee said that the Statute "would require the Secretary of Defense . . . to implement a program to encourage and assist separating or retiring military personnel to enter public or community service jobs." *Id.*

This evinces Congress's main intent for the Act and this Statute, to reduce the number of service personnel and provide them benefits or incentives to elect early retirement. Since Congress desired to reduce the size of the military, it provided incentives to encourage early retirement; but by definition an incentive is only an incentive if the service personnel see it as a benefit. Thus, the Statute was clearly intended to benefit the service personnel; any benefit to the public and community service organizations was just an incidental bonus. Therefore, since the District Court erred in holding that there was nothing in the legislative history

to indicate that Congress intended to benefit the service personnel, but only the public and community service organizations, its decision should be reversed.

II. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE THE SECRETARY OF DEFENSE ACTED *ULTRA VIRES* IN PROMULGATING THE REGULATION.

The Secretary of Defense's (hereinafter "the Secretary's") regulation is contrary to the purpose of Congress. As shown above, the purpose under this Act and section was to reduce the number of service personnel, encourage them to elect early retirement, and to aid them in finding new jobs. By restricting the types of eligible jobs under the statute the Secretary is decreasing the likelihood that someone would elect to take early retirement by reducing potential job opportunities.

In general, a Secretary's decision in enacting regulations pursuant to an act of Congress "is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (overruled on other grounds) (citations omitted). As the Supreme Court noted in *Overton Park*, a Secretary's actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (2006) (hereinafter APA), with only two

exceptions, neither of which are applicable here.[1] *Id.* at 413.

Under the APA, 5 U.S.C. § 706 (2006), a court is required to "hold unlawful and set aside agency action" that violates any one of the six standards of review enumerated in the statute. As the *Overton Park* Court noted, two of these standards are only applicable in specific cases, neither of which involve the instant case.[2] The *Overton Park* Court condensed the other four standards into three. *Id.* at 415-17. This Court applied the *Overton Park* analysis in *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978). This Court said that it must "initially inquire whether the regulations were promulgated in excess of statutory authority. Second, the regulations may not be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' Finally, we must determine whether the agency followed necessary procedural requirements in the promulgation of the regulations." *Id.* at 632.

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[1] The two exceptions are "statutory prohibition on review or where 'agency action is committed to agency discretion by law.'" *Overton Park*, 401 U.S. at 410. However, as in *Overton Park*, there is "no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . legislative intent' to restrict access to judicial review." *Id*.

[2] The last two standards under § 706 are: (1) the substantial-evidence standard, which is only used if "the administrative action is taken pursuant to the rulemaking provisions of the APA", *Overton Park*, 401 U.S. at 414, and (2) the *de novo* review standard, which is only used "when the action is adjudicatory in nature and the agency fact finding procedures are inadequate" or if issues not before the agency "are raised in a proceeding to enforce nonadjudicatory agency action. *Id.* at 415.

While there are three standards of review under *Overton Park*, *Amicus* believes that the first standard is the most germane to the question before this Court. If the Secretary's action violates any one of these standards this Court must strike the regulation under the APA, therefore *Amicus* will not discuss the other two standards.[3]

In *Overton Park*, the Supreme Court noted that when determining whether the Secretary has exceed the scope of his authority, the court must determine how much authority Congress gave the Secretary and whether, on the facts, the Secretary's actions were reasonable "within that range." *Overton Park*, 401 U.S. 416.

Amicus will discuss four cases that demonstrate the difference between what an ultra vires act is and what is not. While an agency can clarify ambiguities, it cannot amend a statute that is clear and leaves no room for interpretation.

We start with two cases in which this Court held that the agency action was *ultra vires*. In those cases, this Court has held that an agency cannot fundamentally change the application of a law, effectively amending it, by classifying the regulation as an interpretation of the provision. For example, in

[3] The discretion afforded to administrative agencies in the interpretation of statutes under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is not applicable in this case because, as will be noted below, no ambiguity exists in the Statue. See, 10 U.S.C. § 1143a(a) and argument below. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43.

Combined Communications Corp. v. United States Postal Service, 891 F.2d 1221 (6th Cir. 1989), this Court examined the Postal Service's authority to adjust mail classifications. Under the Postal Reorganization Act, the Postal Rate Commission, at the request of the Postal Service or on its own accord, may make a recommendation regarding changes to the classifications and rates of mail after a hearing on the record. *Id.* at 1223. After the Commission makes its recommendation, the Board of Governors of the United States Postal Service "may approve the Commission's recommendation, allow it under protest, reject it or modify it." *Id.* However, in *Combined Communications* the Postal Service, on its own initiative, issued a regulation, classifying it as an interpretation, which had the effect of prohibiting a number of publications from qualifying as second-class mail. *Id.* at 1224. The publishers of the excluded mailings sued the Postal Service, alleging that it had effectively amended the Domestic Mail Classification Schedule without first obtaining a recommendation from the Commission. *Id.* This Court found that the Postal Service's regulation was an amendment to the Schedule, and the argument it was only an interpretation was not credible because it "altered the eligibility criteria for second-class rates." *Id.* at 1230. This Court held that since the Postal Service lacked the statutory authority to amend the Schedule the regulation must be held void.[4] *Id.*

[4] This Court also found that the Postal Service violated the APA by not following

Additionally, this Court has held that when a Secretary passes regulations that conflict with Congress's intent, expressed through legislative history, the regulations exceed the Secretary's statutory authority. For example, in *National Truck Equipment Association v. National Highway Traffic Safety Administration*, 919 F.2d 1148 (6th Cir. 1990), the Administration had promulgated a new safety standard for steering column displacement in the event of a head-on collision. *Id.* at 1149. The National Truck Equipment Association, a trade association representing custom made truck manufacturers, challenged the compliance process under the new regulation. *Id.* The Association did not contest the new displacement *standard*, only that the compliance *regulation* was not "practicable" as required by the National Traffic and Motor Vehicle Safety Act. *Id.* The gravamen of the Association's complaint was that small, custom truck manufactures typically do not have the engineering and test resources required by the regulation. After this Court held that compliance regulation was not "practicable," it considered whether the Department had exceeded his statutory authority by promulgating the regulation. *Id.* at 1157. This Court found that while Congress's intent was to reduce danger on the road, but it also did not want "to eradicate consumer choice." *Id.* The Senate Committee's report said that "the

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the proper procedure to change the postal classifications, but as explained above, that standard is not applicable in this case. *Combined Comm'ns Corp.*, 891 F.2d at 1231-32.

committee intends that the Secretary will consider the desirability of affording consumers continued wide range of choices in the selection of motor vehicles." *Id.* at 1157-58 (citing Senate Committee Report, S. Rep. No. 1301, *supra*, 1966 U.S. Code Cong. & Admin. News 2709, 2714). This Court held that the regulation would "eliminate customized trucks for specialized uses" and that Congress did not intend that result, holding the regulation invalid. *Id.* at 1158.

On the other hand, in some cases this Court has also held that the administrative action was not *ultra vires*. In one case, this Court upheld the Veterans Administration's regulations, finding that the regulations were merely clarifying an ambiguity in the statute. *Wayne State University*, 590 F.2d 627 (6th Cir. 1978). The VA's regulations disqualified a group of students at Wayne State University from student veterans' benefits because they were no longer considered "full time." *Id.* at 630. The veterans challenged the promulgated regulations, arguing that the VA had redefined Congress's terminology without authority. *Id.* This Court accepted the Administrator's argument that "the regulations in question do not alter or redefine the congressional parameters of full-time study, but rather explain what Congress meant by the term 'semester hour.'" *Id.* at 634. This Court, applying *Overton Park*'s articulation of the APA's rule, *id.* at 632, held that the VA was authorized to promulgate regulations that are "consistent with any

legislation" that govern it, and thus the regulations were not *ultra vires* because the regulations were consistent. *Id.* at 634.

Another case in which this Court upheld an agency's regulation involved Congress giving the Secretary of Health and Human Services broad authority to promulgate Medicare regulations. *Bedford County Gen. Hosp. v. Heckler*, 757 F.2d 87 (6th Cir. 1985). The Secretary of Health, through regulations, classified patient telephones in hospitals as "personal comfort items," which prevented hospitals from being reimbursed under the Medicare Act. *Id.* at 88. A group of hospitals challenged the regulation, claiming that patient telephones were more appropriately classified as "'ordinarily furnished' hospital facilities, appliances, and equipment." *Id*. This Court noted, once again, that the APA was the applicable standard of review. *Id.* at 89. While this court cited subsections (A) and (C), most of its analysis focused on (A). *Id.* Nonetheless, this Court's reference to the language and legislative history implicated the concerns of subsection (C). *Id.* at 90. Furthermore, this Court incorporated by reference the analyses of various other courts that had upheld the same provision of the Medicare Act. *Id*. (citing cases). Some of those courts, e.g., the Ninth Circuit in *Holy Cross Hospital v. Heckler*, 749 F.2d 1340 (9th Cir. 1984), had relied heavily upon the legislative history to show that arguments against the Secretary's authority were spurious. Thus, when this Court held that the Secretary of Health

was authorized under the statute to promulgate regulations to administer the program, *Heckler*, 757 F.2d at 90, n.1, the lack of conflict with the language or legislative history of the Medicare Act was crucial to this Court's analysis. *Id.* at 90.

When this Court considers all of these cases together, it should come to the conclusion that the Secretary of Defense exceeded his authority by promulgating a regulation that restricted the effect of the Statute from what Congress intended. In the instant case, Congress enacted the statute permitting service personnel who had accrued at least fifteen years of retirement credit to work for public and community service organizations to continue earning retirement credit through twenty years. *Bowman v. United States*, 512 F. Supp. 2d 1056, __, 2007 U.S. Dist. LEXIS 64203 at *2 (N.D. Ohio 2007). However, the Secretary added a restriction in his regulation governing the program to exclude organizations that engage in worship or religious instruction, unless the position is unrelated to those activities. *Id.* at __, 2007 U.S. Dist. LEXIS 64203 at *20.

As in this case, in *Combined Communications Corp.* and *National Truck Equipment Association*, the agencies exceeded their authority in promulgating regulations that conflicted with the statutory or legislative history. In *Combined Communications Corp.*, the Postal Service was not content with the current second-class mail classification, concerned that revenue was being lost. However,

the Postal Service's plan to fix this perceived inadequacy was *ultra vires* because the Postal Service did not have the authority to amend the Domestic Mail Classification Schedule by itself. *Combined Commc'n Corp.*, 891 F.2d at 1230. Similarly in this case, the Secretary argued that he was concerned with potential violations of the Establishment Clause,[5] however he had no authority to restrict the extent of the statute through this regulation because Congress did not give any authority to restrict it in that manner, either on the statute's face, as discussed by the Appellant (Appellant Proof Br. 14-17), or in the legislative history, as discussed above. Furthermore, in *National Truck Equipment Association*, the National Highway Traffic Safety Administration promulgated regulations, as it was authorized to do; however, the regulation that it wrote violated Congress's intent. 919 F.2d at 1157-58. In this case, the Secretary issued a regulation that restricted Congress's intent of reducing the military, by limiting the types of public and community service organizations that early retirees could continue earning retirement credit under the program. In all of these cases, the agencies have attempted to alter the effect of the statute that Congress had intended, thus exceeding their authority under the statute because agencies are limited in the scope of their administrative authority and cannot exceed the authority Congress intended.

[5] Appellant addresses the inadequacies of this concern in his brief. (Appellant's Proof Br. 27-30.)

Unlike in this case, in *Wayne State University* and *Heckler*, the VA and Secretary of Health, respectively, issued regulations that interpreted the statutes enacted by Congress. In *Wayne State University*, the VA simply clarified an ambiguity by requiring a consistent interpretation of "semester hour" by schools that had enrolled veterans for the determination of allocation of benefits that was consistent with the statutory language on which it was based. 590 F.2d at 634. In *Heckle*, the Secretary of Health promulgated a regulation, as it was instructed to do, to administer the Medicare Act, and it did so consistent with the statute and legislative history. 757 F.2d at 90. These cases are different from the instant one. Congress established that its goals were to reduce the number of service personnel and to encourage service personnel to elect early retirement by working for a number of public and community service organizations to continue accruing retirement credit after retirement. 10 U.S.C. § 1143a(g). In this case, there was no ambiguity to clarify or any gaps to fill in the statute, Congress simply directed the Secretary to "implement" the program. 10 U.S.C. § 1143a(a). While the VA in *Wayne State University* and the Secretary of Health in *Heckle*, issued promulgations that were consistent with their governing authority, the Secretary in this case has severely restricted the breadth of the Statute with no support from either the statutory language or the legislative history.

Therefore, by attempting to exclude a number of public and community organizations that include religious activities, the Secretary, in effect, "amend[ed]" the statute, *Combined Commc'ns Corp.*, 891 F.2d 1225. Congress intended the Act to include as many organizations as possible, and the Secretary had no authority to restrict these organizations in that manner. Therefore, the Secretary acted *ultra vires* in promulgating the regulation.

CONCLUSION

For the foregoing reasons, and for additional reasons stated in the Appellant's Brief, the judgment of the District Court should be reversed.

Respectfully submitted
this 20th day of December 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 3,700 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Bowman, v. Untied States of America, et al.*, No. 07-4322, on all required parties by depositing two paper copies in the United States mail, first class postage, prepaid on December 20, 2007 addressed as follows:

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